Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-76-260

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellant,

against

PATRICK J. CUNNINGHAM; BRONX COUNTY DEMOCRATIC EXECUTIVE COMMITTEE; and NEW YORK STATE DEMOCRATIC COMMITTEE,

Appellees.

JURISDICTIONAL STATEMENT

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Appellees.

JURISDICTIONAL STATEMENT

Appellant *pro se*, the Attorney General of the State of New York, appeals from a final judgment of the United States District Court for the Southern District of New York (three-judge court) entered April 26, 1976, which declared N.Y. Election Law § 22 unconstitutional and enjoined its enforcement. This statement is submitted pursuant to Rule 15 of the Rules of the Supreme Court of the United States, to show that the Court has jurisdiction of this appeal and that substantial questions are presented for review.

Opinion Below

The opinion written for the three-judge court by District Judge TENNEY, with separate concurrences by Chief Judge KAUFMAN and Circuit Judge MANSFIELD of the Court of Appeals for the Second Circuit, has not yet been reported. A copy of the opinion (with the concurrences appended) is attached as Appendix A.

Jurisdiction

This suit in equity was commenced under 42 U.S.C. § 1983, and invokes jurisdiction under 28 U.S.C. §§ 1343, 2201 and 2281. It was brought to declare unconstitutional and enjoin the enforcement of New York Election Law § 22 (which subjects a political party officer to removal upon his refusal to waive immunity in an inquiry concerning the conduct of his office or the performance of his duties). The final judgment of the District Court was dated and filed April 26, 1976, and the Attorney General's notice of appeal was filed in that court on June 21, 1976. Copies of the judgment and notice of appeal are attached as Appendices B and C. Jurisdiction to review the decision and judgment is conferred upon the Supreme Court by 28 U.S.C. §§ 1253 and 2101(b).

Statute Involved

New York Election Law § 22 (McKinney's Consolidated Laws of New York, vol. 17, part 1, p. 36) provides as follows:

> § 22. Duty of party officers to appear, testify and waive immunity; penalty
>
> If any party officer shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, grand jury, legislative committee, officer, board or body authorized to conduct any hearing or inquiry concerning the conduct of his party office or the performance of his duties, or having appeared, shall refuse to testify or answer any relevant question, or shall refuse to sign a waiver of immunity against subsequent criminal prosecution, his term or tenure of office shall terminate, such office shall be vacant and he shall be disqualified from holding any party or public office for a period of five years.

Question Presented

May New York safeguard the integrity of its political system by requiring high, unsalaried officers of the political parties constituting an integral part of such system to waive immunity before a Grand Jury, as a prerequisite to continuing in party office?

Statement of the Case

This action for declaratory and injunctive relief was brought under the Civil Rights Law to invalidate New York Election Law §§ 22 which, upon a party officer's refusal to waive immunity in a Grand Jury (or other specified) inquiry concerning his office, terminates his tenure in office and disqualifies him from holding any party or public office for five years.

The underlying facts are few and may be stated briefly. Appellee Cunningham (the plaintiff below) is the Chairman of both the New York State Democratic Committee and the Bronx County Democratic Executive Committee.* He

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* These Committees (who have not appealed) were merely passive defendants in the proceedings below; primarily, their counsel sought expedited consideration and decision because statutorily mandated committee elections (in which Mr. Cunningham proposed to seek renewal of his chairmanships) were then imminent.

has held these chairmanships for several years, at the same time also serving as a member of the State Committee's executive body and as a member of the County Committee. In each of these capacities, he holds a party office created—and is a party officer as defined—by New York law (Election Law §§ 2, 11, 12, 15; see also §§ 13 and 16).

As Chairman of his party's State Committee, Mr. Cunningham holds the rank of "top leader of the Democratic Party in New York State." *N. Y. Democratic Party Rules,* Art. IV § 1(b)(ii). He receives no salary or compensation from his party offices, although it would be permissible under the Party Rules (Art. VI § 4) "to fix a salary for the Chairman of the State Committee in an amount as may be determined from time to time." In private life, Mr. Cunningham is a lawyer in active practice.

In late December, 1975, Mr. Cunningham was subpoenaed to testify before the Extraordinary Special Grand Jury for Bronx County, whose power to inquire concerning the conduct of and performance of duties in his party offices is not in dispute. He then sought in the state courts to quash the subpoena relying, in part, upon the same ground on which the instant action is premised, *i.e.,* the asserted unconstitutionality of N. Y. Election Law § 22 under the First, Fifth and Fourteenth Amendments of the Constitution of the United States and the invalidity of any action taken with respect to him pursuant to § 22. The application to quash was entirely unsuccessful; its denial in the first instance was followed by affirmances in the state appellate courts (*Matter of Cunningham* v. *Nadjari,* 384 N.Y.S. 2d 383, 51 AD 2d 927, affd. 347 NE 2d 915, 39 N Y 2d 314).

Thereafter, on April 12, 1976, Mr. Cunningham attended before the Grand Jury in response to the subpoena. He then and there refused, however, to accede to the Special Prosecutor's request for the execution of a waiver of immunity from prosecution in accordance with Election Law § 22.

This action was commenced the next day via order to show cause. Immediately after a hearing held that same day (April 13), District Judge TENNEY issued a temporary restraining order and a request for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. The ensuing proceedings before the statutory court, designated by order of Judge KAUFMAN dated and filed April 14, 1976, were greatly expedited. In hearing argument on April 19, 1976, the court directed consideration of the merits to be advanced and consolidated with the application for injunctive relief under Rule 65(a)(2) FRCP.*

The decision and opinion of the statutory court dated April 22, 1976 (Appendix A) declared the statute unconstitutional and awarded the injunctive relief requested without passing upon the First Amendment claim. The court so held on constraint of the line of cases decided by this Court beginning with *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), concluding—contrary to our contentions—that the instant case is indistinguishable from the *Garrity* series invalidating statutes requiring a public employee or public contractor to waive immunity in order to continue in such capacity.

The Questions Presented On This Appeal Are Substantial

1.

This Court only recently—during the short interval between the argument and determination below—decided *Baxter* v. *Palmigiano,* U.S. , 47 L.Ed.2d 810, 96 S. Ct. 1551 (April 20, 1976), where the interests of a state were, in the circumstances, found to overbalance a defendant's Fifth Amendment rights. It is our position

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* In view of the accelerated processing of the case, the Attorney General submitted a memorandum of law without filing any formal motion or pleading.

that the facts and circumstances of the instant case are such as to call for a similar balancing, with the like result. Our discussion of the impact of *Baxter* will, therefore, be prefaced by some reference to the nature and magnitude of the interest that New York seeks to protect.

Here, the interest of New York is nothing less than that of maintaining the integrity of its political system. Party officers and the positions they occupy constitute an integral part of the State's political scheme. Indeed, the importance of political party officers is perhaps even greater than that of a single judge, administrator or legislator. They carry the awesome responsibility to take actions and make decisions which permeate the entire system of representative government.

It is the responsibility of party officers to select or recommend those candidates whom they judge to be best qualified to discharge the judicial, legislative and executive responsibilities of government and to then present them to the electorate as the choice of the political party. In many counties such nomination is tantamount to election. Thus, the party officers through their power to nominate have a prime responsibility in the elective process. The people of the State through their elected representatives have recognized the tremendous scope of this responsibility and require that any person who accepts the position of party officer concomitantly agrees that his failure to testify fully and freely concerning the conduct of his duties will result in the relinquishment of that office. N.Y. Election Law § 22 represents a judgment by the people of the State that the failure of a party officer to so testify constitutes a willful breach of the public faith and confidence conferred upon him by his position.

It is fundamental to the political structure of the United States that each of the states retains power under the Tenth Amendment to "establish and maintain" its political system, including the qualifications of those involved or participating in it and the manner of electing state officials,

except insofar as the Constitution itself commands otherwise. *Oregon* v. *Mitchell,* 400 U.S. 112, 124 (1970) (BLACK, J.). As Justice HARLAN persuasively demonstrated, not even the Fourteenth Amendment denied the states that basic right. *Id.* at 152-229 (HARLAN, J.). New York Election Law § 22 is an exercise of that right (as indeed is the entire Election Law) and symbolizes the importance of the State's responsibility in exercising that power. The State is entitled to demand from officers of its political parties not merely integrity but the appearance of integrity, and § 22 does no more than accomplish that purpose.

However, the State's interest is not one uniformly applicable to all citizens. It is one peculiarly limited to a relatively small number of persons who have chosen to accept duties as elected officers of a political party, and therefore as highly visible components of the political system. The State is entitled to require that this small group of party officers be held to a higher standard of integrity than persons not holding such sensitive positions. The State's interest in preserving the integrity of its political system and of the officers of its political parties is even greater than its "strong, legitimate interest in maintaining the integrity of its civil service" recognized by the Court in *Lefkowitz* v. *Turley,* 414 U.S. 70, 78 (1973). The interest is a paramount one, reserved to the State by the Constitution, to regulate "the basic conception of [its] political community." *Dunn* v. *Blumstein,* 405 U.S. 330, 344 (1972).

As important as party officers are to the political system of the State, these offices, however, have no cognizable economic value to appellee Cunningham. Neither in his capacity as State Chairman, County Chairman or his other party offices does he receive any compensation whatever. To the extent that he may derive any vicarious or indirect benefits from holding party office, it may well be that this Court, upon plenary consideration, would not view economic deprivation of this nature as being coercive in a constitutional context. Of additional import upon plenary

consideration, we believe, would be the circumstance that appellee Cunningham holds office as the "top leader" of his party in the State. As the present Chief Judge of the New York Court of Appeals has observed, "rank . . . is not unimportant. One is entitled to doubt that the Supreme Court would find it coercive to require a Judge, a ranking executive officer or a member of the Legislature to surdender his privilege against self-incrimination in order to qualify for or retain his office". *People* v. *Avant*, 307 N E 2d 230, 235, 33 N Y 2d 265, 274 (1973) (BRIETEL, J., concurring.

2.

The Court below premised its ruling striking down the statute on this Court's holdings in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511; *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men* v. *Sanitation Commissioner*, 392 U.S. 280 (1968); and *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973). It found no basis for differentiating § 22, in its application to appellee Cunningham, from the statutes invalidated in the *Garrity-Lefkowitz* cases (conditioning continuation in public employment or contracting upon the waiving of immunity in specified proceedings). In so concluding, however, it did not address itself—beyond a terse footnote reference in passing (see App. A, op. below at fn. 6)—to the just previously announced decision of this Court in *Baxter* v. *Palmigiano*, U.S. , 47 L.Ed.2d 810, 96 S.Ct. 1551 (Apr. 20, 1976).

Briefly stated, the facts in *Baxter* were that respondent, a Rhode Island prison inmate charged with inciting a disturbance, was advised at his in-house prison hearing that he had a right to remain silent which, if exercised, would be held against him. Respondent's ensuing silence was taken into consideration as evidence against him and, upon being found guilty of incitement, he was placed in punitive confinement for thirty days—as vivid an example of

civil punishment as one may expect to find. Yet, the Court held the drawing of this inference to be a constitutionally permissible practice that did not run afoul of the Fifth Amendment.

In at least several respects, *Baxter* may be said to represent a dramatic departure from *Garrity-Lefkowitz*. Significantly, the Court has now established that it is not unconstitutional for an adverse inference of guilt, leading to some form of *civil* punishment, to be drawn from the exercise of one's Fifth Amendment rights. Stated otherwise, there may be circumstances in which it is constitutionally permissible for the government to impose civil penalties, through inferences of guilt, as a means of inducing individuals to forego their Fifth Amendment privilege. The Court employed a balancing test, in which it found the interest of Rhode Island in controlling its correctional process to be so compelling as to outweigh Palmigiano's privilege against self-incrimination. Clearly, the effect of *Baxter* was to introduce limitations upon the *Garrity-Lefkowitz* decisions as well as upon the use of such privilege.

We recognize that a consideration which helped to support constitutionality in *Baxter* is absent in this case. Under Election Law § 22, Cunningham's refusal to waive his Fifth Amendment privilege, standing alone, would result in the loss of his political party offices. The drawing of an inference of guilt from his refusal to waive his rights would have more than mere evidentiary value. However, a balancing test, by its very nature, requires that all considerations be weighed against one another. One consideration is rarely an absolute determinative for it must be examined in light of other considerations. Although this "mere evidence" consideration is absent in this case, the interests of New York State in protecting the integrity of its democratic process appear to be so compelling as to compensate for its absence and still strike the balance in favor of the constitutionality of Election Law § 22. The

need to clarify the *Baxter* balancing test as it would be applied under the facts of this case presents a substantial question of federal law that we respectfully submit should be considered by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Dated: New York, New York
August 17, 1976

Respectfully submitted,

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Appendix A, Opinion.

UNITED STATES DISTRICT COURT
Southern District of New York

76 Civ. 1699 (CHT)

Patrick J. Cunningham,

Plaintiff,

—against—

Bronx County Democratic Executive Committee, New York State Democratic Committee, and Louis J. Lefkowitz, Attorney General of the State of New York,

Defendants.

Three-Judge Court
Irving R. Kaufman, Chief Judge, U.S.C.A.
Walter R. Mansfield, U.S.C.J.
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TENNEY, D.J.

Plaintiff Cunningham, a member and the duly elected chairman of the Bronx County Democratic Executive Committee ("the County Committee"), and a member of the Executive Committee and chairman of the New York State Democratic Committee ("the State Committee"), has instituted this action for a preliminary and permanent injunction and declaratory judgment,[1] restraining the enforcement, operation and execution of § 22 of the Election Law of the State of New York and declaring the unconstitutionality of the said statute as violative of the First, Fifth and Fourteenth Amendments to the Constitution of the United States and the invalidity of any action taken under the said statute with respect to plaintiff.

On April 13, 1976, by order to show cause alleging such unconstitutionality, Cunningham moved for the convening of a three-judge court and a temporary restraining order against defendants. After hearing the parties on that date, the single district judge found that plaintiff had raised issues that were neither insubstantial nor obviously without merit and accordingly issued a temporary restraining order and requested the convening of a three-judge court.[2] Pursuant to the April 14, 1976 order of Chief Judge Irving R. Kaufman the motion for injunctive relief was submitted to this statutory three-judge court which heard argument on April 19, 1976. At that time, the Court ordered the trial of the action on the merits advanced and consolidated with the application for injunctive relief pursuant to Rule 65 (a)(2) of the Federal Rules of Civil Procedure.

It appears that on December 29, 1975 Cunningham was subpoenaed to appear and testify before the Extraordinary Special Grand Jury for Bronx County. Thereafter, he unsuccessfully moved in the state court to quash the subpoena upon the ground, among others, upon which relief is sought in the instant action. Such motion was denied by

the Supreme Court on February 23, 1976 and such order of denial was affirmed by the state appellate courts.

Following such affirmance and on April 12, 1976 Cunningham appeared before the said grand jury pursuant to the subpoena. On that date he was asked to execute a waiver of immunity from prosecution in accordance with Section 22 which he declined to do. Section 22 reads as follows:

> "If any party officer shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, grand jury, legislative committee, officer, board or body authorized to conduct any hearing or inquiry concerning the conduct of his party office or the performance of his duties, or having appeared, shall refuse to testify or answer any relevant question, or shall refuse to sign a waiver of immunity against subsequent criminal prosecution, his term or tenure of office shall terminate, such office shall be vacant and he shall be disqualified from holding any party or public office for a period of five years."

There is no dispute that the grand jury was empowered to inquire concerning Cunningham's conduct of his party offices or the performance of his duties as a party officer.[3]

Cunningham, supported by the New York Civil Liberties Union, as amicus curiae, claims that the statute, insofar as it would remove him from his various party offices, impinges upon the First Amendment rights of political association of the Democratic Party and its members, which Cunningham has vicarious standing to assert. He further contends that his refusal to execute a waiver of immunity from prosecution is a valid exercise of his rights under the Fifth and Fourteenth Amendments. In sum, plaintiff contends that, since Section 22 would operate to remove him from his present party offices and to bar him from holding party or public office for a period of five years as

a sanction for a valid exercise of his constitutionally guaranteed rights, the provision is invalid as to him as violative of the First, Fifth, and Fourteenth Amendments to the Constitution. In addition, plaintiff contends that since the Section is self-executing, it causes him immediate and irreparable harm for which no adequate remedy at law exists.

Since we find Section 22 cumulative of Cunningham's rights under the Fifth and Fourteenth Amendments,[4] we do not pass upon the First Amendment claim. Nor have we considered the due process implications of *Slochower* v. *Board of Higher Education of New York City,* 350 U.S. 551 (1956).

Plaintiff relies on a line of cases emanating from the United States Supreme Court beginning with *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), and including *Spevack* v. *Klein,* 385 U.S. 511 (1967); *Gardner* v. *Broderick,* 392 U.S. 273 (1968); *Uniformed Sanitation Men* v. *Sanitation Commissioner,* 392 U.S. 280 (1968); and *Lefkowitz* v. *Turley,* 414 U.S. 70 (1973). Plaintiff claims that the statutes at issue in each of these cases, all of which were struck down, are analogous to the statute in the instant case in that each conditioned an individual's continuation as a public employee or a public contractor upon the individual's waiver of his privilege against self-incrimination.[5]

Defendant, Louis J. Lefkowitz, the Attorney General of the State of New York, contends that the interest of the State in preserving the integrity of its political system outweighs plaintiff's interest in his offices and his assertion of his constitutional rights. Defendant's argument begins with the proposition that each of the several states retains power to "establish and maintain" its own political system in accordance with the Tenth Amendment. Essential to the exercise of this power is the need for the State to demand from party officers both integrity and the appearance

thereof. Defendant claims that since the offices held by Cunningham are creations of State law, and since the offices carry with them tremendous responsibility for the selection of candidates for political office, they constitute an important part of the overall political system of the State. Thus, defendant would have this Court hold that the interest of the State in maintaining the integrity of party office and, in fact, the political system of the State, predominates over the constitutional rights of the individual.

Defendant would distinguish the instant situation from that existing in the many cases cited by plaintiff on several grounds.

The initial ground upon which the State seeks to distinguish the instant case is the applicability of the statute. Defendant contends that in each of the cases cited by plaintiff the statute was uniformly applicable to all citizens while the statute in the instant case applies to a relatively limited and select number of persons.

Secondly, the State would distinguish the instant situation based upon the sensitivity of the positions held by persons affected by the statute. While the cases cited by plaintiff dealt with public employees and public contractors, the sensitivity and importance of the positions held by party officers must lead, defendant contends, to the conclusion that the public interest rises above the interest sought to be asserted by the individual.

Finally, defendant contends that the element of economic coercion, and its onerous impact on a person's decision to waive a constitutionally guaranteed right, was critical to the decision reached by the Supreme Court in each of the cases cited by plaintiff. Here, however, defendant points to the alleged absence of any element of economic coercion since Cunningham allegedly derives no monetary compensation from the various positions which he holds.

Before discussing the cases already cited which, we believe, compel the decision we reach herein, some historical comment in this bicentennial year of this nation may not be inappropriate—in particular with reference to the Fifth Amendment which provides in pertinent part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." As Mr. Chief Justice Warren wrote in *Quinn* v. *United States*, 349 U.S. 155 (1955):

> "The privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history. As early as 1650, remembrance of the horror of Star Chamber proceedings a decade before had firmly established the privilege in the common law of England. Transplanted to this country as part of our legal heritage, it soon made its way into various state constitutions and ultimately in 1791 into the federal Bill of Rights. The privilege, this Court has stated, 'was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless unfounded or tyrannical prosecutions.' Coequally with our other constitutional guarantees, the Self-Incrimination Clause 'must be accorded liberal construction in favor of the right it was intended to secure.' Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose." *Id.* at 161-62 (footnotes omitted).

Thus, though we may be dealing with the interest of a State in preserving the integrity of its political system, we are also dealing with the fabric of our individual liberties.

Passing then to the cases which we believe control, in *Garrity* v. *New Jersey, supra*, 385 U.S. 493, several police officers were questioned in connection with an investigation by the Attorney General of New Jersey into alleged ticket fixing. Each officer was warned that anything he said could be used against him in any criminal proceeding and that his Fifth Amendment privilege applied, but that his refusal to answer any questions would subject him to removal from office under N.J. Rev. Stat. § 2A:81-17.1 (Supp. 1965). Under the circumstances, the officers answered the questions and some of their answers were then used in criminal prosecutions of them. The officers were convicted and the convictions sustained in the state courts despite the officers' objection that the convictions had been obtained in large part based upon statements which were coerced. In reversing the convictions, the Supreme Court noted:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Id.* at 497.

The Court further noted that "[w]here the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other," *id.* at 498, and concluded that there was no voluntary waiver of the privilege.

In *Spevack* v. *Klein, supra*, 385 U.S. 511, appellant, a lawyer, was called upon to produce records and to testify in a disciplinary proceeding then pending against him, but refused to do so on the basis that the production of the records and his testimony might tend to incriminate him. He was subsequently disbarred. The Court found that the

threat of disbarment with the concomitant loss of professional standing and livelihood was coercive, and held that the lawyer, like the policemen in *Garrity*, could not be forced to choose between self-incrimination and loss of employment or professional standing. *Id.* at 516. In a concurring opinion, Mr. Justice Fortas distinguished between the lawyer, a mere license holder, and a public employee. He carefully noted:

> ". . . I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding." *Id.* at 519-20.

The next case to be decided in this line was *Gardner* v. *Broderick, supra*, 392 U.S. 273. In *Gardner*, a police officer was subpoenaed to appear before a grand jury investigating official corruption. The officer appeared and was advised that the grand jury intended to examine him with regard to the performance of his official duties. He was also advised of his privilege against self-incrimination and was asked to execute a waiver of immunity. He was told that he would be subject to termination under Section 1123 of the New York City Charter if he refused to execute the waiver, but he nevertheless refused to do so. After an administrative hearing he was discharged from

his employment solely for his refusal to sign the waiver. The discharge was upheld on appeal in the courts of the state. The Supreme Court reversed, however, holding that "the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." *Id.* at 279.

In *Uniformed Sanitation Men* v. *Sanitation Commissioner, supra*, 392 U.S. 280, several New York City sanitation men were called before the Commissioner of Investigation of the City who was then investigating alleged corruption in the Sanitation Department. All of the men were made aware of the provisions of Section 1123 of the New York City Charter, namely, that their refusal to testify based on their privilege against self-incrimination would be grounds for termination. As in the other cases discussed herein, the exercise of the privilege was followed by a termination of employment which was upheld on appeal. Once again the Supreme Court reversed, noting that the sanitation men had not been fired for refusing to account for their conduct while employees of the City, but rather for their insistence on asserting their privilege against self-incrimination. *Id.* at 283. The holding of the Court made it clear that continuance in public employment could not be conditioned on the forfeiture of an important constitutional right. *Id.* at 284-85. The Court noted that public employees must account for the performance of their public trust or suffer dismissal for their failure to do so, but only after their privilege against self-incrimination had been preserved. *Id.*

Lefkowitz v. *Turley, supra*, 414 U.S. 70, presented the same basic question in a different factual setting. Both the New York General Municipal Law and the New York Public Authorities Law required public contracts to contain a clause which provides that a contractor must answer all

inquiries concerning the conduct of the contract without regard to the privilege against self-incrimination or risk cancellation of all existing contracts and a five-year disqualification from future contracts. Appellees were two architects who were called to testify before a grand jury concerning charges of conspiracy, bribery, and larceny in connection with public contracts. They were asked to execute waivers of immunity, but refused, and the various public contracting authorities were duly notified. Appellees thereupon sought judicial intervention and a three-judge district court declared the statutory provisions to be unconstitutional as violative of the Fifth and Fourteenth Amendments. The Supreme Court affirmed. *Id.* at 76. The Court was keenly aware of the powerful interest of the State in maintaining the integrity of both civil service and public contracts, but concluded that the privilege could not yield to such considerations. *Id.* at 78-79. The State attempted to distinguish private citizens doing public contracting from public employees. The rationale underlying the claimed distinction was that these contractors did not wholly depend on the State for their livelihood, thus removing the element of economic coercion which would invalidate any waiver of the privilege. In response to this argument, the Court stated:

> "We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor." *Id.* at 83.

Section 22 of the New York Election Law is similar in operation to the statutes struck down in the aforementioned cases in that it conditions tenure in office upon the forfeiture of the privilege against self-incrimination. As such, it would appear to fail to measure up to constitutionally established standards.

We turn, however, to the arguments raised by defendant, the State, in favor of constitutionality.

Defendant initially contends that Section 22 is not a statute of uniform applicability to all citizens, but is limited in its application to a relatively small number of persons in particularly sensitive positions. No cases have been cited by defendant to support this position. No sound reasoning would limit the operation of so fundamental a constitutional right as the privilege against self-incrimination based upon the number of persons within a statutory grouping.

Defendant next seeks to distinguish the instant case based on the sensitivity and importance of party officers to the overall operation of the political system of the State and the maintenance of the integrity of that system. This, of course, is a claim of overriding interest, *i.e.,* that the interest of the state in the operation and integrity of its political system is sufficiently strong to override the privilege. However, as Mr. Justice White observed in *Lefkowitz* v. *Turley, supra,* 414 U.S. at 78, "claims of overriding interests are not unusual in Fifth Amendment litigation and *they have not fared well.*" (Emphasis added).

In support of this argument, defendant cites to the concurring opinion in *People* v. *Avant,* 33 N.Y.2d 265, 352 N.Y.S.2d 161 (1973), wherein it is stated parenthetically:

> "(The lowness in rank of the officer involved is not unimportant. One is entitled to doubt that the Supreme Court would find it coercive to require a Judge, a ranking executive officer, or a member of the Legislature to surrender his privilege against self incrimination in order to qualify for or retain his office.)" *Id.* at 274, 352 N.Y.S.2d at 168.

We find no merit in the suggestion that advancement in office diminishes one's constitutional rights. We further note that the concurrence in *Avant* conceded that "it is now

equally undisputed that one may not be 'coerced' into waiving his constitutional privilege by the withholding of a substantial right to engage in one's occupation or of any other substantial or fundamental exercise of life, liberty, and the pursuit of happiness." *People* v. *Avant, supra,* 33 N.Y.2d at 273, 352 N.Y.S.2d at 167.

As Mr. Justice Douglas stated in *Spevack* v. *Klein, supra,* 385 U.S. at 516:

> "We find no room in the privilege for classifications of people so as to deny it to some and extend it to others."

Lastly, defendant contends that since Cunningham derives no monetary compensation from his various offices he can claim no "substantial economic sanction," *Lefkowitz* v. *Turley, supra,* 414 U.S. at 82, such as to invalidate a waiver of rights as coercive. Each of the cases decided by the Supreme Court and discussed above have spoken in terms of economic loss. Yet in each case economic loss was clearly present and in no case did the Supreme Court have to reach the larger question, *i.e.,* whether the substantial loss must be purely economic. It could be argued that the instant case begs the question.

The loss to the individual as a result of the claim of privilege is important only insofar as it indicates the duress one feels when faced with the choice "between the rock and the whirlpool." The element of duress would operate to invalidate any waiver of the privilege as inherently involuntary. Since the focus is on the coercive element and its impact on freedom of choice, there would appear to be no strong policy reason for limiting the loss exacted to the purely pecuniary.[6]

Indeed, it is logical to assume that in a statute designed to elicit testimony, the alternative to a waiver of the constitutional right, in whatever form, must be coercive or punitive for the statute to be effective.

Cunningham, although not a public officer, is "the top leader of the Democratic Party in New York State." *New York Democratic Party Rules* Art. IV § 1(b)(ii). It is the responsibility of party officers to select or recommend those candidates whom they judge to be best qualified to discharge the judicial, legislative and executive responsibilities of government and to then present them to the electorate as the choice of the political party. In many counties such nomination is tantamount to election. The threat of loss of professional standing and of reputation are powerful forms of compulsion. *Spevack* v. *Klein, supra,* 385 U.S. at 516. To threaten to strip Cunningham of his party position is, given these powers and perquisites, clearly coercive. Indeed the finding of coercion in *Spevack* rested at least as much upon the non-economic aspects of disbarment as the economic, "for the dishonor of disbarment" is mentioned in that opinion before "the deprivation of a livelihood," *id.* at 514, and reference is made to the loss of one's "standing" and "reputation" as a "professional" before it is noted that the loss of "livelihood" is also a consequence of disbarment. *Id.* at 516.

However, there is economic coercion as well present in the instant case. Under Section 22 the party officer is barred for five years from serving as a party or public officer, and the latter position is normally remunerative. Although Cunningham does not presently receive a salary, Article VI § 4 of the *New York Democratic Party Rules* permits the State Committee or the County Committee to fix a salary for the Chairman of the State Committee. We would, moreover, be naive if we did not recognize the inevitable economic impact upon Cunningham, a practicing attorney, concomitant with being forced out, under a cloud, of the state party chairmanship. When this potential economic sanction is viewed alongside the loss of political influence and the damage to reputation which Cunningham would suffer if removed from office through the operation

of Section 22, that level of loss deemed to be coercive would, in fact, be present.

Do we, as may be suggested, in holding for plaintiff foreclose the State in its discovery and prosecution of alleged or suspected political corruption? We think not. As stated by Mr. Justice White in *Lefkowitz* v. *Turley, supra,* 414 U.S. at 84:

> "Although due regard to the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use. *Kastigar* v. *United States*. . . . Furthermore, the accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony, after a grant of immunity, by use of civil contempt and coerced imprisonment. *Shillitani* v. *United States*, 384 U.S. 364 (1966). Also, given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment."

Thus, following the decision of the Supreme Court in *Uniformed Sanitation Men* v. *Sanitation Commissioner, supra,* 392 U.S. 280, the sanitation men were again questioned *after being granted immunity* and refused to answer on the ground, among others, that their privilege against self-incrimination would be violated. The Court of Appeals for this Circuit held that the grant of immunity effectively invalidated the claim of constitutional deprivation. *Uniformed Sanitation Men Association Inc.* v. *Commissioner of Sanitation of the City of New York,* 426 F.2d 619 (2d Cir. 1970), *cert. denied,* 406 U.S. 961 (1972).

In striking down the statute that would penalize Cunningham for the exercise of his constitutional rights we do not condone corruption in public office if and when it is shown to exist, any more than we condone the traffic in drugs, crimes of violence, corruption in business or other crime when we grant the accused freedom from compulsion in the exercise of his constitutional right not to bear witness against himself. Nor are we convinced that a corrupt police force is less of a danger to the state than a corrupt politician.

We are reminded by the late Chief Justice Warren that the constitutional right, privilege or immunity with which we are concerned had its origins in the horror of Star Chamber proceedings in England more than a century before the birth of this nation and we are aware that the victims of the Star Chamber were not merely constables or tradespeople but also men of high office and estate. And when we are instructed that *no man* may be compelled, we are obliged to strike down the instrument that would compel.

Accordingly, plaintiff's claim for preliminary and permanent injunctive and declaratory relief is hereby granted.

So ordered.

IRVING R. KAUFMAN
Ch. U.S.C.J.

WALTER R. MANSFIELD
U.S.C.J.

CHARLES H. TENNEY
U.S.D.J.

Separate concurring opinions by Chief Judge Kaufman and Circuit Judge Mansfield attached herewith.

Dated: April 22, 1976.

FOOTNOTES

[1] Jurisdiction is invoked under 28 U.S.C. § 1343, this being a suit in equity under 42 U.S.C. § 1983; it is further invoked under 28 U.S.C. § 2281 and § 2201.

[2] Title 28 U.S.C. §§ 2281 and 2284.

[3] It should be noted that Cunningham is a party officer, and not a federal, state or local officer. He is not a public officer, *Doherby* v. *Meisser*, 321 N.Y.S.2d 32, 35 (Sup. Ct. Nassau Cty. 1971); *People* v. *Clampitt*, 222 N.Y.S.2d 23, 25 (Ct. of Spec. Sess. N.Y.C. 1961); *Sulli* v. *Board of Supervisors of Monroe County*, 200 N.Y.S.2d 218, 223 (Sup. Ct. Monroe Cty. 1960), although at times he may become involved in the nomination process or help to fill vacancies in elective positions. See *Seergy* v. *Kings County Republican Committee*, 459 F.2d 308, 310 (2d Cir. 1972).

[4] The Fifth Amendment reads in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

The Fourteenth Amendment reads in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

[5] We do not reproduce the offending statutes, but merely note that while the language may not be identical to Section 22, their substance is the same in that each statute would seek to compel testimony by the exaction of a price for a waiver of the constitutional right not to incriminate oneself. We note that there was no statute at issue in *Spevack* v. *Klein*, 385 U.S. 511 (1967).

[6] We do not consider *United States ex rel. Sanney* v. *Montayne*, 500 F.2d 411 (2d Cir.), *cert. denied*, 419 U.S. 1027 (1974) inconsistent with the result we reach herein. In that case the threatened damage to professional or personal reputation was not a compelling factor. The Court, however (500 F.2d at 415), quoted with approval the language of *Spevack* v. *Klein*, *supra*, 385 U.S. at 516 equating such non-economic damage with unconstitutional compulsion.

We are also aware of the decision of the United States Supreme Court on April 20, 1976 in *Baxter* v. *Palmigiano*, 44 U.S.L.W. 4487, 4490 (U.S., April 20, 1976) relating to a prisoner's right to remain silent in a prison disciplinary hearing. Such cases are clearly inapposite. Cunningham is neither a prisoner nor, indeed, an accused.

KAUFMAN, *Chief Judge* (concurring):

I concur fully in Judge Tenney's thorough opinion. It is important, however, lest our action today be misunderstood, that we stress what this Court has *not* held.

Our decision does not in any way mandate that the plaintiff be permitted, by those he represents, to remain in office —or, indeed, that he should be re-elected to his positions within the Democratic party. Nor have we ruled that Cunningham may continue to avoid testifying before the grand jury. To the contrary, Judge Tenney has taken pains to point out that the plaintiff may be compelled to testify and disclose the truth regarding matters under investigation—on pain of imprisonment or fine for refusal to testify or for perjury in any testimony given—so long, of course, as the immunity which the Constitution[1] requires be afforded to *all* witnesses is also extended to him.

Finally, our holding places no restraint whatsoever on the State's power to prosecute Patrick Cunningham on the basis of evidence that it may already have uncovered, or will discover in the future, through its official investigations. But, the State cannot coerce Cunningham to establish its charges out of his own mouth. As Mr. Justice Frankfurter so eloquently stated,

> Ours is the accusatorial as opposed to the inquisitorial system. . . . Under our system society carries the burden of proving its charge . . . It must establish its case, not by interrogation of the accused. . . ., but by evidence independently secured through skillful investigation.

Watts v. *Indiana*, 338 U.S. 49, 54 (1949).

Only at our peril and at the peril of our free governmental process can we ignore the immense dangers posed by corruption and by abuses of official position. But, when

faced by a statute intended to uncover possible misconduct which inescapably runs afoul of the fundamental guarantees of the Fifth Amendment, our duty is clear beyond peradventure.

It must have been apparent to all who played a role in this constitutional drama, after even cursory research of the authorities, that the answer to the narrow constitutional question presented to us had been clearly foreordained by the United States Supreme Court in an unbroken series of decisions during the past decade. Judge Tenney's opinion describes with admirable clarity how the Supreme Court has consistently struck down as unconstitutional a number of statutes virtually identical in their wording and practical impact to the one before us today. We will not—and, indeed, we cannot—flout that unambiguous mandate. Judge Cardozo (then Judge on the New York Court of Appeals) reminded us a judge is

> not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. . . . He is not to yield to spasmodic sentiment. . . .

Cardozo, *The Nature of the Judicial Process* at 144 (1921).

Our task is narrowly circumscribed: we must view § 22 of the New York Election Law in light of the Fifth Amendment and its consistent application by the Supreme Court in similar circumstances. And we must remain ever mindful that the fundamental protections of the Constitution and its Bill of Rights extend to all citizens, whether popular and powerful, or weak and oppressed. It "covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866).

By our decision today we do not condone the abuse by any individual—however exalted his position may be—of

his power or the public trust. Some will undoubtedly dispute the wisdom or propriety of Cunningham's decision to exercise his rights not to testify before the grand jury, given the circumstances here present. Its political or ethical consequences, however, can only be determined in the public arena.

IRVING R. KAUFMAN
Chief Judge, U.S. Court of Appeals for the Second Circuit

FOOTNOTE

[1] We are not faced with the question whether any additional immunity may be required under New York State statutes, although this is a question the Deputy Attorney General undoubtedly will wish to consider. *See, e.g.*, N.Y. Crim. Proc. Law §§ 50.10(1), 190.40(2).

MANSFIELD, *Circuit Judge* (Concurring):

Were this a case of first impression, the Attorney General's arguments might be persuasive. But in light of the firmly settled Supreme Court case law on the constitutional issue, I subscribe to Judge Tenney's clear-cut, carefully considered statement of what we hold and to Chief Judge Kaufman's further explication of what we do not hold.

Though the result may not yield to popular hue and cry, it adheres to the rule of law by which we are all bound. "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 483, 54 S.Ct. 231, 256, 78 L.Ed. 413 (1934) (Sutherland, J., dissenting).

WALTER R. MANSFIELD
Walter R. Mansfield, U.S.C.J.

Dated: New York, N.Y.
April 22, 1976.

Appendix B, Judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civil 1699 (CHT)

PATRICK J. CUNNINGHAM
Plaintiff

—against—

BRONX COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, NEW YORK STATE DEMOCRATIC COMMITTEE and LOUIS J. LEFKOWITZ, Attorney General of the State of New York
Defendants

A Statutory Court hearing having been convened, and the said hearing having been held before the Honorables Irving R. Kaufman, Chief Judge, U.S.C., Walter R. Mansfield, USCJ, and Charles H. Tenney, U.S.D.J., and the Court thereafter on April 22, 1976, having handed down its opinion granting plaintiff's claim for preliminary and permanent injunctive and declaratory relief, it is,

ORDERED, ADJUDGED and DECREED: That plaintiff PATRICK J. CUNNINGHAM have judgment against defendants BRONX COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, NEW YORK STATE DEMOCRATIC COMMITTEE and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, permanently enjoining the said defendants from enforcing or applying the subject statute as to plaintiff, and declaring said statute to be unconstitutional.

Dated: New York, N.Y.
April 26, 1976

RAYMOND F. BURGHARDT
Clerk

Appendix C, Notice of Appeal to the Supreme Court of the United States.

(Filed June 21, 1976)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civil 1699 (CHT)

(3 Judge Court)

PATRICK J. CUNNINGHAM,

Plaintiff,

—against—

BRONX COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, NEW YORK STATE DEMOCRATIC COMMITTEE and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

NOTICE is hereby given that LOUIS J. LEFKOWITZ, Attorney General of the State of New York, a defendant in the above-captioned action, hereby appeals to the Supreme Court of the United States from the final order and judgment of the three-judge court dated and entered in this action on April 26, 1976, declaring § 22 of the New York Election Law unconstitutional and permanently enjoining defendants from enforcing or applying said statute as to plaintiff.

Appendix C, Notice of Appeal to the Supreme Court of the United States.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
June 2, 1976

Yours, etc.,

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State of New York
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Appendix C, Notice of Appeal to the Supreme Court of the United States.

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Supreme Court, U. S.
FILED
DEC 1 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-260

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellant,

against

PATRICK J. CUNNINGHAM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appeal Docketed August 21, 1976

Probable Jurisdiction Noted October 18, 1976

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The Final Judgment of the District Court has been reproduced in the Appendix to Jurisdictional Statement at 21a.	

Docket Entries.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1699 (CHT)

PATRICK J. CUNNINGHAM,

Plaintiff,

against

BRONX COUNTY DEMOCRATIC EXECUTIVE COMMITTEE,
NEW YORK STATE DEMOCRATIC COMMITTEE,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

DATE	PROCEEDINGS
04-13-76	(1) Filed Complaint for Injunctive and Declaratory Relief and issued Summons.
04-13-76	(3) Filed Order to Show Cause for Preliminary Injunction & Temporary Restraining Order. Ordered pending hearing of motion for preliminary injunction the Bronx County Democratic Executive Committee, the NY State Democratic Committee and agents, etc. are temporarily restrained from taking any action, directly or indirectly by # 1, 2, & 3 as indicated. Ordered that this order expire within six (6) days

Docket Entries.

DATE	PROCEEDINGS
	after entry unless within such time the order for good cause shown is extended or unless defts consent it may be extended for a longer period. Ordered pltff's motion for preliminary injunction set for 4/16/76 at 2:00 p.m., Room 1105; ordered that copies of order & supporting papers of memorandum of law personally served upon defts or attys by 4:00 P.M. on 4/13/76 shall be deemed good & sufficient service. Tenney, J (mn)
04-14-76 (6)	Filed ORDER. Ordered that hearing of pending motion for preliminary injunction before said three judges shall be held at 2:15 p.m. on 4/19/76, Courtroom 1705, USCH, Foley Sq. NY. Three (3) copies of all briefs shall be submitted to chambers of Hon. Charles T. Tenney, Rm. 1904, no later than Noon, Friday, 4/16/76. Tenney, J.
04-19-76 (9)	Filed Deft. Louis J. Lefkowitz, Atty Gen. of State of NY Memorandum (Pro Se) in support of the Constitutionality of NY Election Law, Sec. 22.
04-22-76 (10)	Filed Mansfield, *Circuit Judge* (concurring): The Atty Gen's arguments might be persuasive, but in light of firmly settled Supreme Court case law on constitutional issue, I subscribe to Judge Tenney's clear-cut, carefully considered statement of what we hold & to Chief Judge Kaufman's further explication of what we do not hold, etc. Mansfield, U.S.C.J. (mn) (OPINION # 44286).

Docket Entries.

DATE	PROCEEDINGS
04-22-76 (11)	Filed KAUFMAN, *Chief Judge* (concurring) OPINION # 44285. By our decision today we do not condone the abuse by any individual—however exalted his position may be—etc. KAUFMAN, Ch. Judge, USCA, 2nd Circuit (mn).
04-22-76 (12)	Filed OPINION # 44284. (3 Judge Court) Pltff's claim for preliminary & permanent injunctive & declaratory relief is hereby granted. So ordered. KAUFMAN: MANSFIELD, TENNEY, J. (mn).
04-26-76 (20)	Filed JUDGMENT. Ordered adjudged and Decreed that pltff have judgment against defts Bronx County Democratic Executive Committee, NY State Democratic Committee and Louis J. Lefkowitz, Atty Gen. of State of NY, permanently enjoining said defts from enforcing or applying subject statute as to pltff and declaring said statute to be unconstitutional. Clk (mn).
05-12-76 (22)	Filed TRANSCRIPT OF RECORD OF PROCEEDINGS dated 4/19/76.
06-21-76 (24)	Filed Deft Louis J. Lefkowitz, Atty Gen. of State of NY Notice of Appeal to Supreme Court of U.S. from final judgment of three-judge court entered 04-26-76.

Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Plaintiff, by his undersigned attorneys, for his complaint herein, alleges as follows:

1. This is a proceeding for a preliminary and permanent injunction and a declaratory judgment, restraining the enforcement, operation and execution of § 22 of the Election Law of the State of New York and declaring the unconstitutionality of the said statute as violative of the First, Fifth and Fourteenth Amendments to the Constitution of the United States and the invalidity of any action taken under the said statute with respect to the plaintiff.

2. Jurisdiction of the Court is invoked under 28 U.S.C. § 1343, this being a suit in equity under 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States; jurisdiction is further invoked under 28 U.S.C. § 2281, this being a suit for a preliminary and permanent injunction restraining the enforcement, operation and execution of § 22 of the New York Election Law, and requiring the convening of a three-judge district court; jurisdiction is further invoked under 28 U.S.C. § 2201, this being a suit for a declaratory judgment declaring the unconstitutionality of § 22 of the New York Election Law. The wrongs herein complained of have occurred or will occur in the Southern District of New York and each of the parties resides in or maintains an office for the transaction of business in the said District.

3. The plaintiff, Patrick J. Cunningham, a citizen of the United States and a citizen and resident of the State of

New York, is and at all relevant times has been both a member and the duly elected chairman of both the Bronx County Democratic Executive Committee and the New York State Democratic Committee. In each of his four said capacities, *i.e.*, his two memberships and his two chairmanships, he is a party officer as defined by § 2 of the New York State Election Law.

4. On December 29, 1975, the plaintiff was subpoenaed to appear and testify before the Extraordinary Special Grand Jury for Bronx County. In connection with the said subpoena, Deputy Attorney General Maurice H. Nadjari, the prosecutor conducting the grand jury injuiry, conveyed a warning to the plaintiff that a refusal by the plaintiff to execute a waiver of immunity would bring into application against him the aforementioned § 22 of the New York Election Law resulting in the termination and vacation of his positions as party officer.

5. Plaintiff thereupon instituted in the Supreme Court of New York a proceeding to quash the said subpoena upon the ground, among others, upon which relief is sought in the instant action as hereinafter stated. Plaintiff's motion to quash the subpoena was denied by the Supreme Court of February 23, 1976. Upon plaintiff's successive appeals the said order of denial of plaintiff's motion was affirmed by the Appellate Division of the Supreme Court of New York on March 16, 1976, and by the New York Court of Appeals on April 1, 1976.

6. On April 12, 1976, in compliance with the aforesaid subpoena, the plaintiff did appear before the Extraordinary Special Grand Jury for Bronx County and, being then and there requested to execute a waiver of immunity from criminal prosecution, made an application to the Honorable Leonard Sandler, Judge of the New York Supreme Court for a stay of the Grand Jury proceeding for a time sufficient to file in the United States District Court for the

Southern District of New York a complaint seeking an injunction against the operation and enforcement against plaintiff of § 22 of the New York Election Law and a temporary restraining order pending decision on the merits. In lieu of the stay applied for, Judge Sandler, enjoined and restrained for one week the operation and enforcement against plaintiff of § 22 of the New York Election Law in order to give plaintiff an opportunity to proceed with his action in the United States District Court for the Southern District of New York, with the understanding that plaintiff would immediately return to the Grand Jury and there make his election with respect to the waiver of immunity requested of him. Plaintiff thereupon returned to the Grand Jury and then and there refused to execute the waiver of immunity and was thereafter not questioned.

7. Section 22 of the New York Election Law provides:

> "If any party officer shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, grand jury, legislative committee, officer, board or body authorized to conduct any hearing or inquiry concerning the conduct of his party office or the performance of his duties, or having appeared, shall refuse to testify or answer any relevant question, or shall refuse to sign a waiver of immunity against subsequent criminal prosecution, his term or tenure of office shall terminate, such office shall be vacant and he shall be disqualified from holding any party or public office for a period of five years."

8. The defendants Bronx County Democratic Executive Committee and New York State Democratic Committee are political party entities organized and existing under §§ 11 and 12 of the New York Election Law and, as such, are suable entities under New York Law.

9. Each of the said two Committees, in the event of the disqualification or removal of any member, is charged by § 17 of the New York Election Law with the duty to fill the said vacancy as therein provided. Each of the said two Committees, moreover, is charged by § 15 of the New York Election Law with the responsibility of electing its chairman.

10. The effect of § 22 of the New York Election Law, if it is allowed to operate and be enforced, is automatically and by operation of law, to have terminated plaintiff's tenure of his four party offices, vacated the said offices, and disqualified plaintiff for five years from occupying any of them or any other party office or any public office. In such event, unless the Court enjoins such action, the two defendant Committees will treat plaintiff's respective memberships and chairmanships to have been terminated by operation of law and will immediately proceed to replace him in his four party offices. Moreover, plaintiff's chairmanship of the Bronx County Democratic Executive Committee, expires on April 20, 1976, and plaintiff intends to run for said office; and plaintiff's chairmanship of the New York State Democratic Committee expires on April 23, 1976 and plaintiff intends to run for re-election to that office. Accordingly, unless this Court enjoins the operation against plaintiff of § 22 of the New York Election Law, the said section will be urged as disqualifying plaintiff from re-election to either or both of said offices.

11. Defendant Louis J. Lefkowitz is the Attorney General of the State of New York and the superior officer to Deputy Attorney General Nadjari who, as alleged in paragraph 4 hereof, had warned the plaintiff of the application against him of § 22 of the New York Election Law if he should refuse to waive immunity. The defendant Lefkowitz, as Attorney General, is charged with the responsibility for any action to be taken by or on behalf

of the State of New York to enforce § 22 of the New York Election Law and to prevent the plaintiff from continuing to function in his party offices, including the bringing against the plaintiff of any action in the nature of *quo warranto* or the bringing against the defendant Committees of any action to compel their compliance with their obligations under the provisions of the New York Election Law.

12. The plaintiff's occupancy of each of his four party offices is a proper and valid exercise by him of a right secured to him by the First Amendment to the Constitution of the United States.

13. The plaintiff's refusal to waive his immunity from criminal prosecution is a proper and valid exercise of his privilege secured to him by the Fifth Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment to the Constitution of the United States.

14. Section 22 of the New York Election Law, insofar as it terminates plaintiff's party offices and disqualifies him from holding political party or public office as a sanction for having exercised his privilege against self-incrimination, violates the First, Fifth and Fourteenth Amendments to the Constitution of the United States and, since it purports to be automatic in its operation, causes plaintiff immediate and irreparable harm for which he has no adequate remedy at law. The said statute should, therefore, be held unconstitutional and of no force and effect against the plaintiff and any action taken thereunder against the plaintiff should be held null and void.

15. Any act taken by any of the defendants or by any persons in concert with them, in reliance upon § 22 of the New York Election Law, to interfere in any way with the plaintiff's occupancy of any of his positions as a party

officer, would irreparably injure him in the enjoyment of his right to freedom of political association under the First Amendment to the Constitution of the United States and would also invade the similar rights of all enrolled Democratic voters in Bronx County and New York respectively. The plaintiff has no adequate remedy at law to right such wrongs. The Court should, therefore, enjoin any such interference.

WHEREFORE, plaintiff respectfully prays that:

(1) Upon the filing of this complaint, the Court, as may appear proper and convenient:

(a) Issue such process upon the defendants as required by law;

(b) Issue a temporary restraining order, restraining the defendants, their agents, employees and successors, and all persons acting in concert with any of them from enforcing the provisions of § 22 of the New York Election Law and from interfering in any way, directly or indirectly, on the basis of any provision of said statute, with plaintiff's tenure in office as a member and as chairman of the Bronx County Democratic Executive Committee and the New York State Democratic Committee;

(c) Convene a Three Judge District Court as required by 28 U.S.C. §§ 2281 and 2284;

(d) Advance this action on the docket and order a speedy hearing of the action according to law;

(2) After hearing the parties, the Court issue a temporary injunction enjoining the defendants, their agents, employees and successors, and all persons acting in concert with any of them, pending trial of this action, from enforcing the provisions of § 22 of the New York Election

Complaint.

Law and from interfering in any way, directly or indirectly, on the basis of any provision of said statute, with plaintiff's tenure in office as a member and as chairman of the Bronx County Democratic Executive Committee and the New York State Democratic Committee;

(3) After trial of the action, the Court:

(a) Enter a judgment declaring that § 22 of the New York Election Law is void as repugnant to the First, Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) Issue a decree making the preliminary injunction permanent;

(c) Allow plaintiff his costs herein;
and

(d) Grant such other and further relief as it may deem proper.

WILLIAMS, CONNOLLY & CALIFANO

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Transcript of Record of Proceedings Dated April 19, 1976, pp. 3-12 (omitting pp. 1-2 and 13-64).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

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(3) Judge Kaufman: Good afternoon, gentlemen.

We will hear argument in Patrick J. Cunningham against Bronx County Democratic Executive Committee, et al.

Mr. Williams: May I proceed, if the Court please?

Judge Kaufman: Yes. I think it would be a good idea for us to agree first that, since this is an application for a temporary injunction, we might as well hear it on the merits of the case.

Mr. Williams: Yes, sir.

Judge Kaufman: Does everyone agree to that pursuant to Rule 65? So that we will have that entered on the record.

I think one or two other stipulations are in order, so that we don't have to take any testimony in this case.

Can we agree that the facts alleged in the complaint, paragraphs 3, 4, 5, 6, and 11, are stipulated?

Mr. Galt: May I be heard a moment, your Honor?

Judge Kaufman: Yes.

Mr. Galt: In essence—

Judge Kaufman: You are Mr. Galt?

Mr. Galt: Mr. Galt, Attorney General's Office.

In essence, we don't take exception to these facts nor refuse to stipulate to them, but there are several nuances that we do not even know about. For example, "In (4) connection with the said subpoena"—and I am reading from paragraph 4—"Deputy Attorney General Maurice H.

Nadjari, the prosecutor conducting the grand jury inquiry, conveyed a warning to the plaintiff that a refusal by the plaintiff to execute a waiver of immunity would bring into application against him," etc.

It would seem to me that without in any way diminishing the plaintiff's case, that could be stated otherwise. I cannot know for a fact that it took place this way. And there may be connotations resting on that other than for purposes of arguing the merits of this case. It may have to do with the Special Prosecutor's conduct of his proceeding that I would not want to prejudice. At the same time I am most anxious to cooperate as much as possible with the Court. But I don't want to swallow all of these allegations wholesale.

Judge Kaufman: Mr. Galt, can you agree, then, for the purpose of this case and this hearing, that you will stipulate to that and limit it to that purpose only?

Mr. Galt: May I have one moment, your Honor?

Judge Kaufman: Yes.

(Pause.)

Mr. Galt: What that would imply I am not quite sure, your Honor, because I understand that it is the Special (5) Prosecutor's position that he did not issue such a warning.

It would seem to me that, since we are concerned here with the question of whether the statute itself exerts coercion upon the plaintiff, this allegation would be superfluous in any event.

Is there any need, in other words, to denominate just how this brought the matter into focus? I think it would suffice to say, if I may respectfully suggest it to the Court—and Mr. Williams I don't think would object if I put it this way—it would suffice to say that there came a point on April 12, I believe was the date, at which a

waiver of immunity was requested and not signed. And we know that there exists Section 22 of the Election Law. Would it be necessary in anywise to your Honor's disposition of the case to have this refined detail of fact which might have consequences that I cannot foresee at the moment?

Judge Kaufman: The only thought that occurs to me is that they are asking for a temporary injunction, and the implication of an application for a temporary injunction is that somebody has said he is going to do something, unless there is a temporary injunction. I don't understand that there is any problem. Mr. Williams, do you want to say anything?

Mr. Williams: I may have a helpful suggestion. (6) I hope so, your Honor.

There is on file in the record here an affidavit from Mr. Perrin, who was counsel for Mr. Cunningham. Paragraph 5 of that affidavit recites in one sentence the following: "Your deponent was advised, however, that the inquiry would cover the plaintiff's conduct of his political party offices, thereby involving application of Section 22."

Mr. Galt: I think, Mr. Williams, this is along the line that I had suggested, and both Mr. Williams and I seem to be in agreement that this would suffice to present the matter to the Court, without going into the further references to the precise kind of statements or suggestions that may or may not have been made by the Special Prosecutor.

Judge Kaufman: We will accept that suggestion. That is all right.

One other fact I think we ought to have on the record. Is Mr. Cunningham a lawyer?

Mr. Williams: Yes, he is, your Honor.

Judge Kaufman: Is that agreed?

Mr. Williams: Yes, that is conceded.

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Judge Kaufman: It is conceded.

Mr. Williams: Your Honor, as far as the plaintiff and moving party is concerned, I can say that I have looked at all the factual allegations recited in all the pleadings (7) here, and I don't think there are any that can be controverted. I think the recitation of facts here by all parties is accurate, and we certainly accept all those facts as being true for the purposes of the application which we make to the Court.

Judge Kaufman: We suggested specifically, and I don't know whether it got to you, that you stipulate—I want to get out of this file Mr. Lefkowitz's brief—page 8, the first two sentences.

Mr. Williams: Yes, sir. We do stipulate to that, your Honor, and I might say that I saw that annexed to the brief filed at the invitation of the Court by the American Civil Liberties Union. They are the Rules of the Democratic Party for the State of New York and they are in all respects accurate, and we so stipulate.

Judge Kaufman: Very well. Proceed.

Mr. Galt: Your Honor, may I interrupt for just one moment to carry this thought one step further.

There are further suggestions here about what happened before Judge Sandler. These are facts which we could not know about to stipulate. I understand there was a stay such as the plaintiff describes. But the other events that are associated with it we do not—

Judge Kaufman: What are you referring to?

(8) Mr. Galt: Oh, for instance, paragraph 6. I don't know that that is critical to the case in any event, whether Judge Sandler did or did not issue a TRO. There has been no question of any consequence had the TRO not been issued by him at that time. And then that was subsumed by Judge Tenney's TRO issued Wednesday. Things of this nature we are not conceding—

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Judge Kaufman: Things of this nature may be necessary in order for us to be able to decide this intelligently, particularly on jurisdiction. It is here, and it is a very simple thing, and I would not want either side to make much about it, because it is insignificant.

If you find really that is terribly disturbing to you, to be able to say that Judge Sandler enjoined and restrained him for one week, I must say it is beyond my comprehension.

Mr. Galt: Your Honor, I am not objecting to that. I would concede that, even though I didn't know it to be a fact, because it is of no particular consequence, and I am anxious for your Honor to be able to have the matter before him. I merely pointed out that there are some statements in here of matters that took place and we could not possibly know the fact with respect to them. We do not conduct the operations of the Special Prosecutor's Office.

(9) Can we have a stipulation from Mr. Williams as to the nature of the inquiry conducted by the Special Prosecutor, so that there will be no question that it comes within the orbit of the statute if the statute is constitutional?

Mr. Williams: I am not quite sure what I am being asked to do, your Honor, but I do agree that Section 22 is applicable. I do agree that there was intended to be made an inquiry into the witness' conduct of his duties as a party officer, if that is what counsel is asking me to do. We said that in our moving papers, we said it in a supporting affidavit, and I repeat it.

Mr. Schweitzer: Your Honor, if it please the Court, in paragraph 3—

Judge Kaufman: Wait a minute. Identify yourself.

Mr. Schweitzer: My name is Melvin Schweitzer, your Honor, counsel to the New York State Democratic Committee. In paragraph 3, just for purposes of clarification—

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I don't think it will bear on it—I don't think Mr. Cunningham is a member of the New York State Democratic Committee. I believe he is a member of its Executive Committee and Chairman of the State Committee, but not actually a member of the State Committee.

Judge Kaufman: In other words, he has been both (10) a member and an elected chairman.

Mr. Schweitzer: He is a member of the Executive Committee and Chairman.

Judge Kaufman: And is he both a member and Chairman of the Bronx County Democratic Committee?

Mr. Schweitzer: As to the Bronx—

Mr. Raucher: Your Honor, my name is David Raucher. I am counsel to the Bronx County Democratic Committee.

Judge Kaufman: Yes. Is he a member and duly elected Chairman?

Mr. Raucher: He is duly elected Chairman and member of the Executive Committee, which is a defendant in this lawsuit. I think, insofar as the State Committee is concerned, it was the committee itself, the State Committee, rather than the State Committee's Executive Committee—

Judge Kaufman: He is Chairman of the State Committee?

Mr. Schweitzer: Chairman of the State Committee, yes, and member of the Executive Committee but not a member of the committee itself.

Mr. Galt: Your Honor, I take this from papers that were before this; I think this is part of the opinion (11) of Judge Sandler on another phase of the case. I would ask Mr. Williams to stipulate that the grand jury before whom the plaintiff was requested to testify after signing a waiver of immunity is primarily concerned with an investigation into allegations of criminal acts affecting and relating to nominations for judicial office.

Transcript of Record of Proceedings Dated April 19, 1976, pp. 3-12 (omitting pp. 1-2 and 13-64).

Judge Kaufman: All right, Mr. Williams.

Mr. Williams: May I proceed, your Honor?

Judge Kaufman: You may proceed. Do you want to respond first?

Mr. Williams: Well, your Honor, I can answer that. The fact of the matter is that the jurisdiction of the Deputy Attorney General, at his request, was extended to inquire, in the area of the Bronx, as to the conduct of the Chairman of the Bronx County Democratic Committee in his political office as Chairman. So that it was broader than simply looking into criminal conduct; it was a broader and more sweeping inquiry than that.

But I don't think we are dealing with things that are material to the issues that are before the Court at the moment, your Honor. I really don't. There is no question about the fact that Cunningham—

Judge Kaufman: I don't think there is anything in the stipulations that I requested that dealt with the (12) so-called merits of the investigation or the substance of the investigation.

Mr. Williams: That is correct.

Judge Kaufman: We are dealing in the main with jurisdictional questions, and some of that may have been a little superfluous. At any rate, let us proceed.

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Rules of the Democratic Party of the State of New York.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

February, 1976

RULES
OF THE
DEMOCRATIC PARTY OF THE STATE OF NEW YORK

. . . .

Preamble: The purpose of these rules is to inspire and encourage the greatest number of Democrats to participate in the affairs of the Democratic Party of the State of New York to insure the continuing success of the Democratic Party, and to provide the best possible responsible government for the people of the State of New York.

The Democratic State Committee of the State of New York hereby adopts the following rules for the government of the Democratic Party of the State of New York.

ARTICLE I

General Provisions

Section 1. (a) The basis of the organization of the Democratic Party of the State of New York shall be the duly enrolled Democrats in every Election District within the State.

(b) The State Committee shall be the official organization of the Democratic Party of the State of New

Rules of the Democratic Party of the State of New York.

York. It shall possess such powers and perform such duties as may be fixed by statute or prescribed by these rules.

(c)(1) All public meetings at all levels of the Democratic Party of New York are open to all members of the Democratic Party of New York regardless of race, sex, age, color, creed, national origin, religion, ethnic identity, economic status or philosophical persuasion.

(2) No test for membership in, nor any oath of loyalty to, the Democratic Party of New York shall be required or used that has the effect of requiring prospective or current members of the Democratic Party to acquiesce in, condone, or support discrimination on the grounds of race, sex, age, color, creed, national origin, religion, ethnic identity or ecomonic status.

(3) The time and place for all public meetings of the Democratic Party of New York on all levels shall be publicized fully and in such manner as to assure timely notice to all interested persons. Such meetings shall be held in places accessible to all Party members and large enough to accommodate all interested persons.

(4) The Democratic Party, on all levels, shall support the broadest possible registration without discrimination on grounds of race, sex, age, color, creed, national origin, religion, ethnic identity or economic status.

(5) The Democratic Party of New York shall publicize fully and in such manner as to assure notice to all interested parties a full description of the legal and practical procedures for selection of the Party's officers and representatives on all levels. Publication of these procedures shall be made in such fashion that all prospective and current members of the Party in the State of New York will be fully and adequately informed of the perti-

nent procedures in time to participate in each selection procedure at all levels of the Party's organization.

(6) The responsible officers of the Democratic Party of New York shall publicize fully and in such manner as to assure notice to all interested parties a complete description of the legal and practical qualifications for all officers and representatives of the Democratic Party of the State of New York. Such publication shall be effected in timely fashion so that all prospective candidates or applicants for any elected or appointed position within the Party will have full and adequate opportunity to compete for office.

Section 2. *The structure of the Party shall be as follows:*

(a) The unit of representation of the State Committee shall be the Assembly District from which the members of the State Committee shall be elected and, except upon the vote for the designation of candidates for any office to be filled by the voters of the entire state, each Assembly District shall be entitled to two votes.

(1) In each Assembly District which comprises a whole county or is entirely within a county there shall be elected two members of the State Committee, each of whom shall have one vote.

(2) In each Assembly District which promises [sic] two or more whole counties, two members shall be elected from each whole county, and each member so elected to cast a proportionate part of the two votes to which the Assembly District is entitled.

(3) In each Assembly District which comprises one or more whole counties and one or more parts of counties, each whole county shall be entitled to

elect two members and part of a county shall be entitled to elect one member, and the members so elected shall be entitled to cast a proportionate share of the two votes to which the Assembly District is entitled.

(4) In each Assembly District which comprises only parts of two or more counties and no whole county or counties, each such part of a county shall be entitled to elect one member, except that if any such part of a county cast 75% or more of the total Democratic vote for Governor in the Assembly District, such part shall be entitled to elect two members. The members representing the parts of two or more counties and no whole county or counties shall cast the proportionate share of the vote to which the Assembly District is entitled.

(5) In cases where provision is made above for the election of two members, one shall be a male and the other a female.

(6) The vote of each member elected under the foregoing provisions of this Section 2 (a) shall be that portion of the two votes to which the Assembly District is entitled which is represented by a fraction, of which the numerator is the total vote cast for the Democratic candidate for Governor at the last election for that office in that portion of the Assembly District from which the member was elected and the denominator of which shall be the total vote cast at such election for the office of Governor in the entire Assembly District, to the nearest tenth. Where a portion of an Assembly District, from which the member was elected is represented by two members, each member shall be entitled to cast one-half of the vote to which such portion of the Assembly District is entitled.

(b) The County Committees in each county shall be constituted by the election in each Election

District within such county of at least two members and such additional members not in excess of two (2) as the rules of the County Committee within the county or the statements filed pursuant to section eighteen of the Election Law may provide for such district proportional to the party vote in the district for Governor of the past preceding gubernatorial election, pursuant to statute.

(c) District Committees in and for each of the other political subdivisions of the State other than towns, villages, and school districts.

(i) Where a political subdivision is coterminous with or less than the limits of, but wholly within, one county, the members of the County Committee from such political subdivision shall constitute the committee in and for such political subdivision.

(ii) If a political subdivision consists of more than one county, the District Committee for such subdivision shall be composed of the Chairmen of the County Committees of the various counties, or parts of counties, situated within the political subdivisions.

Section 3. *National Convention Delegates and Alternates*

(a) *District Delegates and District Alternates Elected in Spring Primary*

(1) *Number and Appointment.* A number of district delegates, with one vote each, equal to seventy-five percent (75%) of the number of votes at the Democratic national Convention allotted to New York State and a number of district alternates equal to seventy-five percent (75%) of the number of alternates allotted to New York State, shall be elected from the Congressional Districts within the State at the Spring Primary Election to

be held pursuant to New York Election Law Section 21. The number of district delegates and district alternates to be elected from each Congressional District shall be allotted to such district according to the formula provided in Rule 9. A. (1) of the 1976 Delegate Selection Rules: a formula giving equal weight to total population and to the average of the vote for the Democratic candidates in the two most recent presidential elections as follows:

(i) The number of votes cast for the Democratic presidential candidate in 1972 on the Democratic line in each of the thirty-nine (39) New York State Congressional Districts shall be added together with the number of votes cast for the Democratic presidential candidate in 1968 on the Democratic line in each such Congressional District, and the total shall be divided by two, establishing the average presidential vote for each Congressional District; the total number of votes cast for the Democratic presidential candidate in 1972 in all of the thirty-nine (39) New York State Congressional Districts shall be added together with the total number of votes cast for the Democratic presidential candidate in 1968 on the Democratic line in all of the thirty-nine (39) New York State Congressional Districts, and the total shall be divided by two (2), establishing the average presidential vote for New York State; the average presidential vote for each Congressional District shall be divided by the average presidential vote for New York State, the result constituting an "average presidential vote formula number" for each Congressional District.

(ii) the population figures according to the 1970 census for each Congressional District shall be divided by the population figures according to the 1970 census for New York State: the result constituting a "population formula number" for each Congressional District.

(iii) the average presidential formula number for each Congressional District shall be added to the population formula number for each Congressional District and the total for each Congressional District shall then be divided by two (2): the result constituting a "formula percentage" for each Congressional District consisting of a whole number and a fractional percentage remainder carried to three (3) decimal places.

(iv) the formula percentage for each Congressional District shall be divided into seventy-five percent (75%) of the number of delegates and alternates respectively that have been allotted to New York State.

(v) The basic allotment of respective delegates and alternates allotted to each Congressional District shall be the respective whole number derived from the computation in subparagraph (i) hereof, ignoring the fractional percentage remainder.

(vi) if the respective totals of delegates or alternates, as the case may be, derived from the computations in subparagraphs (i) through (v) hereof do not equal seventy-five percent (75%) of the respective delegates and alternates allotted to New York State, then any remaining delegates or alternates, as the case may be, up to seventy-five percent (75%) shall be allotted one at a time to those Congressional Districts with the highest respective fractional percentage remainder.

(2) *Declaring Presidential Preference or Uncommitted Status.* Each person who files a petition for district delegate or district alternate with the officer or board with whom or which such petition is required to be filed shall file with the Secretary of the State Committee not later than the last day for filing such petition pursuant to the New York Election Law, a sworn notarized statement which shall indicate that he or she is uncommitted, or that he or she supports a specifically named individual who is a candidate for nomination to the office of President of the United States (hereinafter referred to as a "presidential candidate"). For any person who files a sworn notarized statment that he or she supports a presidential candidate, there also shall be filed with the Secretary of the State Committee not later than seven days after the last day for the filing of petitions pursuant to the New York Election Law, a certificate signed by such presidential candidate or by an agent authorized in writing by such presidential candidate, such written authorization to be simultaneously filed, attesting to the fact that such presidential candidate agrees that at the Spring Primary the candidate for district delegate or district alternate shall be identified as supporting that presidential candidate.

(3) *Obtaining Approval of Presidential Candidates.* Persons desiring to be candidates for district delegate or district alternate identified as supporting a presidential candidate, or who wish to recommend the names of such persons (necessitating compliance with the provisions of Paragraph 2 hereof) may send the name, address and a brief biographical sketch of each proposed candidate for district delegate or district alternate, together with the name of the presidential candidate with which the person desires to be identified, to either the New York representative of the presidential candidate, or to the Secretary of the State Committee, addressed to a special Post Office Box which shall be established by the State Committee for this purpose. The Secretary of the State Committee shall forward to the appropriate New York representative of each presidential candidate all names received by the State Committee. A presidential candidate

shall have the right to require a person filing a designating petition for district delegate or district alternate to sign a sworn statement of support before the presidential candidate files a certificate with the Secretary of the State Committee pursuant to the provisions of Paragraph 2 hereof.

(4) *Publicizing Presidential Preference or Uncommitted Status.* The New York Democratic Party shall undertake to publicize to all eligible Democratic voters the presidential preference or uncommitted status of each candidate for district delegate or district alternate by (i) sending press releases to newspapers and mass and local media outlets throughout New York State, (ii) distributing public service announcements and/or tapes to such mass and local media outlets, and (iii) mailing lists containing this information to all target constituent Democratic groups listed in the appendices to the Affirmative Action Plan of the New York State Democratic Party, as supplemented. Any candidate for district delegate or district alternate for whom a certificate has not been filed pursuant to Paragraph 2 hereof but who files a sworn, notarized statement that he or she supports a presidential candidate shall be publicized as follows: "The following persons have met all state law requirements to appear on the ballot as candidates for district delegate or district alternate. They have not fulfilled Democratic Party requirements to be committed to a presidential candidate or to be uncommitted." Nothing herein shall be deemed to require the use of any paid advertising by the New York State Democratic Party or to require the Party to engage in any conduct contrary to the provisions of New York Election Law Section 19.

(5) *Binding Support of Presidential Candidates.* All district delegates and district alternates who

have been elected as supporting a presidential candidate pursuant to Paragraph 2 hereof shall vote for that presidential candidate on the first ballot at the Democratic National Convention unless such presidential candidate shall have earlier withdrawn from such presidential candidacy or otherwise publicly released such delegates or alternates, or specifically released any individual district delegate or district alternate in writing.

(b) *Delegates-at-large and Alternates-at-large.*

(1) *Number and Apportionment.* In order to encourage the selection of a New York State delegation to the Democratic National Convention which includes public officials, party officials and members of traditionally underrepresented Democratic constituencies, the New York State Democratic Committee shall elect from the State at-large a number of delegates, with one vote each, equal to twenty-five percent (25%) of the number of votes at the Democratic National Convention allotted to New York State, and a number of alternates equal to twenty-five percent (25%) of the number of alternates allotted to New York State. This election shall take place at a meeting of the State Committee called for that purpose on ten (10) days notice after the Spring Primary, but no later than forty (40) days following Spring Primary Election.

(2) *Reflecting the Division of Presidential Preference and Uncommitted Status.* The election of at-large delegates and at-large alternates respectively by the New York State Democratic Committee shall fairly reflect the division of presidential preference and uncommitted status of the respective district delegates and district alternates elected in the Spring Primary as follows:

(i) the respective percentage of at-large delegates or at-large alternates, as the case may be, that is allocated to each presidential candidate or to uncommitted status shall be the same as, or nearly equal to the respective statewide percentage of district delegates or district alternates, as the case may be, that has been elected at the Spring Primary as authorized supporters of such presidential candidate or as being uncommitted.

(ii) in the event that a presidential candidate supported by elected district delegates and/or district alternates, as the case may be, withdraws from such presidential candidacy on or before the date of the State Committee meeting, the expressed presidential preference or uncommitted status, as the case may be of such district delegates and/or district alternates at the time of the State Committee meeting shall be counted in computing the respective statewide percentage of district delegates or district alternates as the case may be for the purpose of allocating the respective percentage of at-large delegates and at-large alternates. District delegates and/or district alternates desiring to be uncommitted or identified as supporting a different presidential candidate pursuant to this subparagraph shall file with the Secretary of the State Committee on or before the date of the State Committee meeting a sworn, notarized statement which shall indicate that he or she is uncommitted, or that he or she supports a different presidential candidate. For any district delegate or district alternate who files a sworn, notarized statement that he or she supports a different presidential candidate there also shall be filed with the Secretary of the State Committee on or before the meeting a certificate signed by such presidential candidate or by an agent authorized by such presidential candidate in writing, such written authorization to be simultaneously filed,

attesting to the fact that such presidential candidate agrees that the district delegate or district alternate shall be identified as supporting that presidential candidate. A presidential candidate shall have the right to require a district delegate or district alternate to sign a sworn statement of support before the presidential candidate files a certificate with the Secretary of the State Committee pursuant to this subparagraph. A district delegate or district alternate who desires to be identified as supporting a different presidential candidate pursuant to this subparagraph, but who fails to file a certificate signed by such presidential candidate or by an agent authorized by such presidential candidate shall not be counted in computing the respective statewide percentage of district delegates or district alternates, as the case may be, for the purpose of allocating the percentage of at-large delegates and at-large alternates pursuant to this subparagraph. The provisions of paragraph (a) (5) hereof with respect to the binding support of presidential candidates shall apply to all district delegates and district alternates identified as supporting a different presidential candidate pursuant to this subparagraph.

(3) *Proposed Candidates for at-large Delegate and at-large Alternate Positions.* Persons desiring to be at-large delegates or at-large alternates, or who wish to recommend the names of such persons shall submit to the Secretary of the State Committee, addressed to a special Post Office Box which shall be established by the State Committee for this purpose, the name, address and a brief biographical sketch of each proposed at-large delegate or at-large alternate, together with the name of the presidential candidate supported by the proposed at-large delegate or at-large alternate, or a statement that the proposed at-large delegate or at-large alternate is uncom-

mitted. Each presidential candidate or an agent authorized in writing by such presidential candidate shall have the right to approve any proposed at-large delegate and at-large alternate supporting that presidential candidate. A presidential candidate shall have the right to require a person seeking to be elected as an at-large delegate or at-large alternate to sign a sworn statement of support before that presidential candidate approves such person. In electing at-large delegates and at-large alternates who are either supporting a presidential candidate or who are uncommitted, the State Committee shall not be limited to names that were received by the Secretary of the State Committee pursuant to this Paragraph.

(4) *Binding Support of Presidential Candidates.* All at-large delegates and at-large alternates who have been elected by the State Committee as supporting a presidential candidate pursuant to Paragraph 2 hereof shall vote for that presidential candidate on the first ballot at the Democratic National Convention, unless such presidential candidate shall have earlier withdrawn from such presidential candidacy or otherwise publicly released such delegates or alternates, or specifically released any individual at-large delegate or at-large alternate in writing.

(5) *Rules and Procedures Governing State Committee Election of at-large Delegates and at-large Alternates.* The New York State Democratic Committee shall be governed by the following rules and procedures in its election of at-large delegates and at-large alternates:

(i) Forty percent (40%) of the members of the State Committee present in person shall constitute a quorum. Less than a quorum may adjourn the meeting, and notice of adjournment shall be given in the same manner as notice of the meeting.

(ii) The members of the State Committee in each Assembly District shall vote on a basis of Democratic voting strength in the same manner as is provided for the designation of candidates for officers to be filled by the votes of the entire State pursuant to Section 6(c) of this Article.

(iii) The use of proxies at the State Committee meeting shall be limited as follows: a duly accredited State Committee member, after having personally appeared at the meeting at which at-large delegates and at-large alternates are to be elected, and after having established his or her credentials as a member of the State Committee, may designate in writing another member of the State Committee who is to vote a proxy at the meeting, provided that no member of the State Committee may hold more than three (3) proxies at a time. A four-member committee comprised of duly elected members of the State Committee shall be appointed to serve as a credentials committee to assure that the provisions of this subparagraph regarding the use of proxies are adhered to.

(c) *Replacement of Delegates by Alternates.*

(1) A delegate shall be replaced by an alternate at the Democratic National Conventional as follows:

(i) A delegate who is to be absent or who resigns shall select from among the alternates of his or her Congressional District, if possible, or from another Congressional District or the State at-large the particular alternate of the same presidential preference or uncommitted status, as the case may be of the delegate being replaced. If there is no district alternate or at-large alternate of the same presidential preference or uncommitted status, as the case may be, as the delegate

being replaced, the delegate who is to be absent or who resigns shall select an alternate from among alternates of his or her Congressional District, if possible, or from another Congressional District or the State at-large.

(ii) If due to death or disability a delegate is unable to select the alternate to take his or her place, that selection shall be made by the New York State Delegation in a manner which shall assure that such alternate will be of the same presidential preference or uncommitted status, as the case may be, from the same Congressional District as the delegate being replaced, if possible, or from another Congressional District or the State at-large. If there is no district alternate or at-large alternate of the same presidential preference or uncommitted status, as the case may be, as the delegate being replaced, the members of the New York State Delegation of the same presidential preference or uncommitted status, as the case may be, shall meet in caucus duly assembled to select an alternate from among the alternates from the same Congressional District as the delegate being replaced, if possible, or from another Congressional District or the State at-large.

(2) An alternate shall be utilized in place of a delegate in accordance with such additional procedures not inconsistent with this Paragraph as may be adopted by the New York State Delegation in caucus duly assembled.

(d) *Filling Alternate Vacancies*

A vacant alternate position shall be filled by the New York State Delegation and the replacement shall be of the same presidential preference or uncommitted status, as the case may be, and, where applicable and if possible, from the same Congressional District as the alternate being replaced.

(e) *Unit Rule Prohibited*

The unit rule, or any other rule or practice whereby all members of a party unit or delegation are required to cast their votes in accordance with the will of the majority of the body, shall not be used at any stage of the delegate selection process.

(f) *Rules of the New York Delegation.*

The New York Delegation to the 1976 Democratic National Convention shall make any additional rules necessary for the conduct of its business.

(g) *Automatic Delegates Prohibited*

No person shall serve as an automatic or ex officio voting delegate at any level of the delegate selection process by virtue of holding a public or party office.

(h) *Slate Making*

Any individual or group of Democrats may sponsor or endorse a slate of candidates for convention delegates. But no slate may, by virtue of such endorsement, receive preferential treatment or a preferential place on a delegate selection ballot or be publicly identified on the ballot as the "official" slate, and all slates must meet identical qualifying requirements for appearing on a ballot at all levels of the delegate selection process.

(i) *Effect of Laws and Party Rules on Voting.*

No delegate at any level of the delegate selection process shall be mandated by law or party rule to vote contrary to the individual's expressed presidential choice.

(j) *Registration.*

The Democratic Party of the State of New York shall take all feasible steps to encourage non-affiliated and new voters to register or enroll as Democrats and to provide simple, easy procedures through which they may do so.

(k) *Non-discrimination.*

In order that the Democratic Party of the State of New York at all levels be an open party which includes rather than excludes people from participating, a program of effective affirmative action is hereby adopted. Discrimination on the basis of race, sex, age, color, national origin, religion, ethnic identity, or economic status in the conduct of the affairs of the Democratic Party of the State of New York is prohibited.

Section 4. *State and Judicial District Convention Delegates.*

Delegates and Alternate Delegates to a State Convention and to the Judicial District Conventions for the nomination of Party candidates for the office of Justice of the State Supreme Court, shall be chosen by the election of such Delegates and Alternate Delegates from each Assembly District in the State as follows:

One Delegate and one Alternate delegate from each Assembly District in the State, and one additional Delegate and one additional Alternate Delegate from each Assembly District in the State for each two thousand five hundred votes or fraction of two thousand five hundred votes cast on the Democratic line in such Assembly District for the Party candidate for Governor at the last preceding general State Election.

Section 5. *Nomination of National Committeeman and National Committeewoman.*

At the organization meeting of the State Committee, in a year in which a presidential election is held, the State Committee shall elect a nominee to serve as National Committeeman and a nominee to serve as National Committeewoman, upon their confirmation by the Democratic National Convention held in that year. Election of such nominees shall be made in the manner provided for the designation of candidates for office to be filled by the voters of the entire State, as set forth in paragraph (c) of Section 6 of this Article.

Section 6. *Nominations other than by Convention.*

(a) Nominations for an office to be filled at a special election shall be made, if for an office to be filled by the voters of the entire state by the State Committee, if for a county office by the County Committee, and if for an office in any of the other political subdivisions of the State by the District Committee thereof, or where wholly within a county, in such other manner as the rules of the County Committee shall provide.

(b) Nominations to fill vacancies to be filled other than at a special election shall be made as provided by statute, or if not provided for by statute, as herein provided or a special election.

(c) At a meeting of the State Committee for the designation of candidates for any office to be filled by the voters of the entire state, in voting for the designation of such candidates the State Committeemen, in each Assembly District shall cast in the aggregate a number of votes equal to the number of votes cast for the Party candidate for Governor on the Democratic line or column at

the last preceding General State Election ("the last gubernatorial vote") in such Assembly District, and the vote to which each State Committeeman in such Assembly District is entitled shall be as follows:

(1) In each Assembly District which comprises a whole county or is entirely within a county each State Committeeman elected therefrom shall cast a number of votes equal to one-half of the last gubernatorial vote cast in such Assembly District.

(2) In each Assembly District which comprises two or more whole counties each of the State Committeemen elected from such a county shall cast a number of votes equal to one-half of the last gubernatorial vote cast in such Assembly District.

(3) In each Assembly District which comprises one or more whole counties and one or more parts of counties, each of the State Committeemen elected from such a whole county shall cast a number of votes equal to one-half of the last gubernatorial vote cast in such county and the State Committeeman elected from such part of a county shall cast a number of votes equal to the last gubernatorial vote.

(4) In each Assembly District which comprises only parts of two or more counties and no whole county or counties, each State Committeeman elected from such a part of a county shall cast a number of votes equal to the last Democratic gubernatorial vote cast in such part of a county (except that if any such part of a county is entitled to two State Committee members, each such member shall cast one-half of the number of such Democratic votes cast in such part of a county).

ARTICLE II

The State Committee

Section 1. *Organization.* The members of the State Committee shall meet within fifteen (15) days after their election. They shall organize at such meeting by the election of the following persons: Chairman, five Vice-Chairmen, Treasurer, Assistant Treasurer, Secretary, Assistant Secretary and Sergeant-at-arms, none of whom need be members of the State Committee. Three of the five Vice-Chairmen, the Assistant Treasurer, and Assistant Secretary shall be of the opposite sex from the Chairman, the Treasurer and Secretary, respectively. If the office of a Vice-Chairman, Treasurer, Assistant Treasurer, Secretary, Assistant Secretary, or Sergeant-at-arms, becomes vacant for any reason, the Chairman may fill such vacancy by appointment, and the person so appointed shall hold office until the vacancy shall be filled as provided in Section 13 of this Article.

Section 2. *Standing Committees.* There shall be the following standing committees of the State Committee: Executive Committee, Finance Committee, Law Committee, Campaign Committee, Committee on Legislation and a Committee on Platform and Resolutions. At least two (2) members of each standing committee shall be members of the State Committee. Except as otherwise provided herein, the Chairman and members of all committees shall be appointed by the State Chairman. Each standing committee to the extent feasible shall have equal representation from both sexes.

There shall be by appointment of the State Chairman an Advisory Council to deal on Community and Public Af-

fairs which shall function through appropriate sub-committees on Education, Transportation, Housing, Civil Rights, any any other subjects concerned with the public welfare. This Committee shall work in close liaison with the Research Director.

Section 3. *Executive Committee.*

(a) The Executive Committee shall consist of the Chairman, the Vice Chairman, the Secretary, the Treasurer, Chairman of the Law Committee, Chairman of the Finance Committee, Assistant Secretary, Assistant Treasurer, the Director of Organization, the Chairman of the Advisory Council, and the Chairman of the Democratic Labor Task Force, two (2) members from each of the eleven (11) Judicial Districts in the State, one male and one female, elected by the State Committee members from each of such Judicial Districts, and eight (8) at-large members, four male and four female, to be elected by the entire membership of the State Committee upon nomination by the Chairman.

(b) Except in a Judicial District consisting of only one county, no more than one of the Judicial District representatives shall be from the same county. Where one county has more than a majority of the members of the State Committee from a Judicial District, the State Committee members from such county shall elect one (1) of the Executive Committee members, and the State Committee members from other counties of such Judicial District shall elect the other member of the Executive Committee.

(c) The representatives of the Judicial Districts shall be members of the State Committee, or Chairmen, or Co-Chairmen or Vice-Chairmen of County Committees, or County Executive Committees or officials of

County Committees who occupy positions having similar duties and responsibilities.

(d) The Chairman and Secretary of the State Committee shall be the Chairman and the Secretary of the Executive Committee respectively.

(e) Regular meetings of the Executive Committee shall be held in each of the months of February, June, November of each year on such days at such hours and places as shall be designated by the Chairman.

(f) Special meetings of the Executive Committee shall be held at the call of the Chairman or upon written request of ten of the members of the Executive Committee addressed to the Chairman or Secretary.

(g) The Secretary shall give written notice of regular meetings of the Executive Committee to each member of the Committee, not less than seven (7) days prior to the date of each meeting. Special meetings of the Executive Committee held upon the call of the Chairman shall be upon such written notice as the Chairman may direct. Special meetings of the Executive Committee held upon the request of ten (10) of the members shall take place within twenty (20) days after such request and upon at least seven (7) days prior written notice.

(h) A member of the Executive Committee may authorize as his proxy only another member of the Executive Committee, but in no event shall a member of the executive committee hold more than one proxy.

(i) Fifteen (15) members of the Executive Committee present in person shall constitute a quorum for the transaction of business. Less than a quorum may adjourn the meeting and notice of adjournment shall be given in the same manner as notice of meeting.

(j) Except in matters which require the action of the State Committee under the provisions of the Election Law, or in matters otherwise specifically provided for in these Rules, the Executive Committee shall have power to act for the State Committee between meetings of the State Committee, and any action of the Executive Committee may be overruled by the State Committee.

Section 4. *Finance Committee.* There shall be a Finance Committee which shall have the responsibility for raising funds for the State Committee.

Section 5. *Law Committee.* There shall be a Law Committee and each County shall be represented thereon by a member appointed by the State Chairman on nomination of the respective County Chairmen.

Section 6. *Campaign Committee.* There shall be a Campaign Committee which shall have responsibility on a year-round basis for the planning, organization, and conduct of Statewide election campaigns and shall assist local and County Committees in their election campaigns.

Section 7. *Committee on Legislation.* There shall be a Committee on Legislation which shall work with the Research Director and shall prepare and issue reports and statements affecting legislation on all levels of government.

Section 8. *Committee on Platforms and Resolutions.* There shall be a Committee on Platforms and Resolutions which shall prepare, consider and report on all platform proposals, petitions and resolutions.

Section 9. *Special Committees.* The Chairman shall have power to appoint from time to time such Special Committees as may be necessary or appropriate.

Section 10. *Research Director.* There shall be a Research Director appointed by the Chairman, and such staff members of a research division as shall be appropriate on a full-time, year-round basis.

Section 11. *Director of Organization.* There shall be, at the discretion of the Chairman, a Director of Organization, whose functions it shall be to travel throughout the State and keep in close contact with the county organizations.

Section 12. *Term of Office.* All officers elected under these Rules and members of the Executive Committee shall hold office during the term of the State Committee which elected them until their successors are elected. Officers may be removed by a vote of a majority of the members of the State Committee at any meeting where notice under Article III of such business has been given.

Section 13. *Filling of Vacancies.*

(a) In case of the death, declination, disqualification, resignation, removal from district or removal from office of a member of the State Committee, or failure to elect a member, as by reason of a tie vote, the vacancy of such State Committee caused thereby shall be filled by the remaining members of such State Committee by the selection of an enrolled voter of the Democratic Party qualified for election from the unit of representation as to which such vacancy shall have occurred.

(b) In the event of death, declination, disqualification, resignation, or removal from office of an officer, such vacancy shall be filled by a majority vote of the members of the State Committee at the meeting where such vacancy shall occur or be reported or at a subsequent meeting.

ARTICLE III

MEETINGS

Section 1. *Regular Meetings.* At least three (3) regular meetings of the State Committee shall be held each year as close as feasible to the months of January, April and September, at such times and places as may be fixed by the Chairman thereof, but in alternative locations, downstate and upstate, upon ten (10) days prior written notice in addition, there shall be at least one (1) regional meeting of the State Committeemen in the Northern, Western, and Central portions of the State respectively.

Section 2. *Special Meetings.* Special meetings of the State Committee may be called by the Chairman at any time on ten (10) days prior written notice. Special meetings shall also be called by the Chairman upon the written request of at least one-sixth of the State Committee members, which request shall state the purposes thereof. Meetings shall be held on the date designated in the request, provided such date is not less than ten (10) days following receipt of the request. The Chairman shall call meeting and give at least ten (10) days prior written notice thereof.

Section 3. *Quorum.* Except as provided in Article I, Section 3(a)(i) and Section 3(b)(i), one hunderd (100) members of the State Committee present in person or by proxy in conformity with these rules shall constitute a quorum for the transaction of business. Less than a quorum may adjourn the meeting and notice of adjournment shall be given in the same manner as notice of meeting.

Section 4. *Proxies.* The use of proxies at meetings of the State Committee shall be limited as follows:

(a) A proxy holder must be a resident of the same Judicial District as the State Committee members giving the proxy.

(b) No individual may hold more than five (5) proxies at any meeting; proxies shall be non-transferable.

Section 5. *Holdover.* Until the meeting of the State Committee for organization, the officers of the outgoing Committees shall continue in office until the election of their respective successors.

Section 6. *Order of Business.* At all meetings of the State Committee, the following shall be the order of business.

(a) Calling of rolls

(b) Filling of vacancies

(c) Election of officers

(d) Unfinished business

(e) Reports of officers

(f) Reports of committees

(e) New business

There shall be a report from all Standing Committees at each regular meeting of the State Committee. There shall be included on the agenda of any meeting of the State Committee any item or resolution that shall have been requested in writing of the Chairman or the Secretary by ten (10) or more members of the State Committee at least ten (10) days prior to the date of such meeting. Any such resolution shall be sent with the Notice of Meeting required by Section 1 hereof. In addition, other than mat-

ters involving amendments to these By-Laws and removal of officers, special provisions for which are herein otherwise provided, all other business may be brought to the floor at each duly constituted meeting of the State Committee upon motion duly seconded by two (2) members of the State Committee. A proposed resolution a written copy of which has not accompanied the Notice of Meeting, may not be adopted by a vote of less than two-thirds (⅔) of the members attending in person or by proxy.

Section 7. *Voting.* The following method shall be used when there is voting by roll call:

(a) The roll shall be called by assembly district starting with the first assembly district and continuing in order to the 150th assembly district;

(b) The member present or the proxy shall cast the vote allocated, at the time the district is called, or shall be recorded as "passed";

(c) Upon completion of the roll, the Chair shall order the roll to be called once again in order of assembly districts for just those members or proxies who are recorded as passed, or who were not present during the first Call;

(d) Upon the conclusion of the Roll Call in "c" above, the balloting is closed for that Roll Call.

ARTICLE IV

Duties of Officers and State Committee Members

Section 1. (a) The Chairman, Secretary, Treasurer and other officers provided for in these rules shall perform the duties usually incident to their respective offices or as may be assigned to them.

(b) The Chairman. In addition to the duties usually incident to his office, the State Chairman is empowered:

(i) to convene binding arbitration panels for consideration of intra-party disputes submitted by contending parties within the Party which are not capable of being settled in Primaries.

(ii) to act, and he shall be so recognized, as the top leader of the Democratic Party in New York State, and to serve as formal Chairman of all state-wide election campaigns.

(iii) to convene periodic meetings with the Democratic leaders of the Legislature in Albany and with Democratic members of the New York State Congesssional Delegation in Washington in order to translate the views of the State Party on substantive issues into public policy and to inspire and mobilize vigorous public and Party support of all major legislation which implements the New York State Democratic Party Platform and progress, and to challenge or expose the errors or inadequacies of the Republican Governor and other Republican officials of the State.

(c) The Vice Chairman shall have such duties and responsibilities as may be determined by the State Committee or the Chairman.

(d) The Treasurer shall file an annual written audited financial report in the office of the State Committee, which shall be available for inspection at any time by any member thereof.

(e) Expenditures shall be made by order of and upon vouchers signed by the Chairman or the Treasurer.

(f) The Chairman and Treasurer may prepare an annual administrative budget which shall be submitted to the Executive Committee.

(g) In addition to the duties, powers and functions prescribed by the Election Law and these rules, it shall be the responsibility of members of the State Committee to disseminate, within their respective Assembly Districts, information with respect to State Committee policies and programs, for the purpose of effectuating such policies and programs. To this end, the State Committeemen shall maintain continuing liaison with the head of the Research Division of the State Committee and with the Chairman of all Standing Committees. Such information or community action project on behalf of the State Committee should be undertaken in consultation with the local county leadership of the Party, and enlist their support and keep them fully advised of all steps taken in furtherance of the project.

ARTICLE V

Amendments

These rules may be amended from time to time by a majority of the members of the Committee present in person, or by proxy, at a meeting at which there is a quorum, provided a copy of the proposed amendment shall be sent with the notice of the meeting at which such amendments is to be proposed.

ARTICLE VI

Miscellaneous

Section 1. *Rules of Procedure.* In all cases not provided for by law or by the Rules, the authority for parliamentary procedure for the State Committee and the Executive Committee shall be "Robert's Rules of Order", latest edition insofar as such rules of order may be appropriately applied.

Section 2. *Minutes.* Minutes of the meeting of the State Committee and the Executive Committee shall be recorded and sent to all members of these committees.

Section 3. *Copy of Rules.* A copy of these rules shall be on file in the office of the Democratic State Committee and shall be made available on request to any duly enrolled Democrat.

Section 4. *Salary.* The State Committee or the Executive Committee in its place may fix a salary for the Chairman of the State Committee in an amount as may be determined from time to time.

Section 5. *Funds and Borrowing.*

(a) The funds of the State Committee shall be deposited from time to time in such financial institutions authorized to do business in the State of New York as may be determined by resolution of the State Committee or the Executive Committee, or by the certificate of the Chairman and the Treasurer of the State Committee, and all withdrawals from any such bank accounts shall be by check or draft signed by the Chairman, the Treasurer or the Assistant Treasurer.

(b) The Chairman and the Treasurer, jointly, are authorized and empowered to borrow from any financial institution authorized to do business in the State of New York, or from any partnership or individual, from time to time, as in their judgment may be deemed appro-

priate or necessary to the business and affairs of the State Committee, such sum or sums of money, upon such terms and for such periods of time as they may deem appropriate, for proper expenses in connection with the conduct of an election campaign (but not a primary campaign) or for the expenses of maintaining and carrying on the business of the State Committee between election campaigns; provided however that such authorization and power to borrow funds shall be subject to such restrictions as the State Committee or Executive Committee may from time to time determine. Any such borrowing shall be evidenced by the promissory note or notes or written evidence of indebtedness, and obligation of the State Committee, signed by the Chairman and Treasurer. Money so borrowed by the Chairman and Treasurer, jointly, shall be deposited in the name of the State Committee. In the absence or unavailability of the Treasurer or Assistant Treasurer, the Secretary may perform any of the duties or functions hereinabove provided for in this subdivision (b) of Section 5 of Article VI.

Section 6. *Obligation of Candidates seeking or holding Party or Public Office.* All of those persons seeking or holding party or public office under the Democratic Party label or Democratic Party name, thereby undertake, while so serving or seeking to serve, not to oppose publicly the election of any Democratic nominee for office in New York State.

Section 7. *Appendix.* There shall be appended to these Rules, as a part thereof, all reference of state statutes related to selection of delegates to the Democratic National Convention. As last amended December 15, 1975.

APPENDIX A

§ 10-14 The foregoing sections define "Party" Committees and provide for the election of State and County Committee members. They provide for the lawful structure of the State Committee which creates the "Rules" for selection of "Delegates to National Party Conventions".

§ 15 *Organization and Rules of State and County Committees*

Defines the method of electing members and creating the Rules of State and County Committees.

§ 18 Provides for the Filing of the "Party Call" and is related because it relates to the Party Positions of members of the State Committee and delegates/alternates.

§ 20 Guidelines for *Name and Emblem* of Political Parties.

§ 21 *Delegates to National Party Convention*

Defines the method of selecting and qualification of such delegates and alternates.

§ 104 Provides for the *Order of Names upon the Ballot*

§ 108 Provides for the *Form of the Ballots for Primary Election*

§ 132 *Conventions*

Provides for the holding of State Conventions, the adoption of Party "platforms and

policies", election of "Party officers", and the transaction of "other business relating to party affairs" and the general conduct of State Conventions.

§ 134, 135, 136, 137	Relate to the *Rules and Form of Designating Petitions*
§ 139, 140, 142	Relate to *Accepance or Declination of Nomination and Filling Vacancies*
§ 143	Provides for the Dates of Filing of Forms in Connection with Petition
§ 144	Provides for *Places for Filing Petitions*
§ 145	Relates to *Objections to Petitions*
§ 148, 148a	Relate to Write-in Candidates
§ 270, 271	Provides for the canvass of Primary returns and notice of election to delegates and alternates, as well as certification.
§ 320-327	Provides for the filing of *Statements of Campaign Receipts and Expenditures,* the *Time and Places of Filing and the Rules and Regulations* relating thereto
§ 330, 336	*Judicial Proceedings*

. . . . .

The following is a reference to relevant sections of the New York Election Law that are directly related to the delegate selection process, as required by CRC Reg. 8.06:

The election of district delegates and district alternates from the State's 39 Congressional Districts (Section 21) is presently scheduled for the first Tuesday in April, known as the Spring Primary (Section 191).

The election of at-large delegates and at-large alternates shall be by the New York State Democratic Committee pursuant to New York Democratic Party Rules adopted by the State Committee (Sections 15 and 21). The members of the State Committee are elected in each of the 150 Assembly Districts in New York State. The State Committee is composed of one male and one female representative from each of the 150 Assembly Districts. Additional members (given a proportional weighted vote) are elected to the State Committee by the enrolled Democrats within a county, in those Assembly Districts that are not contained wholly within a county (Section 11; N.Y. Democratic Party Rules, Article 1, Section 2(a).

Only voters enrolled as Democrats are allowed to vote in the Democratic Party Spring Primary (Section 21). A candidate for district delegate or district alternate must be an enrolled Democrat (Section 21). A candidate for member of the State Committee must be an enrolled Democrat and a resident of the Assembly District which he or she seeks to represent (Section 11).

Not later than the twelfth Tuesday before the Spring Primary, a Party Call will be issued for each of the State's 62 Counties to be filed with the Board of Elections. Each Call will include the member of the district delegates and district alternates, and the number of members of the State Committee to be elected in the respective Congressional Districts and Assembly Districts within each County (Section 18).

In order for a candidate to have his or her name placed on the Primary ballot a designating petition must be filed by such candidate with the appropriate Board of Elections. There is no filing fee. The form to which such petition must conform is specified in the law (Section 135).

Rules of the Democratic Party of the State of New York.

Present law requires that the petitions for district delegates or district alternates be signed by not less than 5% of the enrolled Democratic voters in the Congressional District, but in no event is the number of signatures required to exceed 1250 (Section 136.6(g) and 136.7). Present law requires that petitions for members of the State Committee be signed by not less than 5% of the enrolled Democratic voters in the Assembly District, but in no event is the number of signatures required to exceed 500 (Sections 136.6(i) and 136.7).

The first day for signing petitions is 12 weeks before the Spring Primary Election (Section 136.9). These petitions must be filed no earlier than the eighth Monday and no later than the seventh Thursday preceding the Spring Primary (Section 143.1). The law allows for declinations and substitutions (Sections 139, 140 and 142) and also provides a method by which to object to the petitions (Section 145) and a recourse to the State Supreme Court for any aggrieved party member or candidate (Section 330). Opportunity to ballot in a Primary Election for a write-in candidate is also afforded Democratic voters (Section 148 and 148 (a).

Designating petitions for the position of delegate or alternate to the 1976 Convention can designate one or more candidates (Section 136). The candidates' positions on the ballot are determined by lot except in the City of New York where they are rotated (Section 104 and 242 (a). Candidates can be grouped together if they were filed on the same designating petition (Section 104 and 242 (a).

A canvas of the Spring Primary returns, notice of election and certification of election is provided for (Sections 270 and 271).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-260

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Appellant*,

against

PATRICK J. CUNNINGHAM; BRONX COUNTY DEMOCRATIC EXECUTIVE COMMITTEE; and NEW YORK STATE DEMOCRATIC COMMITTEE, *Appellees*.

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-260

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Appellant*,

against

PATRICK J. CUNNINGHAM; BRONX COUNTY DEMOCRATIC EXECUTIVE COMMITTEE; and NEW YORK STATE DEMOCRATIC COMMITTEE, *Appellees*.

MOTION TO DISMISS OR AFFIRM

Appellee, Patrick J. Cunningham, by his undersigned counsel and pursuant to Supreme Court Rule 16, subdivisions 1(c) and 1(d), moves to dismiss or affirm on the grounds that:

1. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; and

2. There is a substantial likelihood that the cause will become moot within the time which would be required for full briefing, argument, and plenary consideration by this Court.

STATEMENT OF THE CASE

Appellee has no substantial quarrel with the statement of the case contained in the Jurisdictional Statement and with the statement of facts in the opinion below.

ARGUMENT

I. The Decision of the Three-Judge Court Was Manifestly Right and Presents No Substantial Question for Determination by This Court.

A.

The court below properly concluded that this Court's decisions in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n.* v. *Commissioner*, 392 U.S. 280 (1968); and *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), compelled it to hold New York Election Law § 22 unconstitutional.

Contrary to the implications of the Jurisdictional Statement, Election Law § 22 is not simply a prophylactic device, narrowly drawn to achieve the laudatory and limited purpose of compelling public officials to account for their conduct in office. The Special Prosecutor was seeking evidence from Appellee upon which to ground an indictment, and not merely engaged in a generalized investigation of Appellee's discharge of party duty. Appellee has, in fact, since been indicted. Moreover, New York Election Law § 22 not only works a forfeiture of Appellee's party positions, to which he was elected by the suffrage of his fellow Democrats, but would also disqualify him from any party or public office for a period of five years.

The court below quite properly found that invalidation of New York Election Law § 22 does not leave

Appellant entirely disarmed in the battle against corruption in public life. By his citation of *Uniformed Sanitation Men Ass'n.* v. *Commissioner*, 426 F.2d 619 (2d Cir. 1970), District Judge Tenney recognized that a more narrowly drawn provision providing for use immunity might well be permissible.

B.

Appellant cites *Baxter* v. *Palmigiano*, 424 U.S. — (April 20, 1976) and suggests that this Court has sounded a retreat from the principles so recently reaffirmed in *Lefkowitz* v. *Turley, supra*. *Baxter* holds that an adverse inference may be drawn from an inmate's silence in an essentially non-criminal prison disciplinary proceeding. The inference would be of no more weight than ought rationally, based upon the whole record, to be given it in a particular case. See I, C, *infra*.

By contrast, New York Election Law § 22 makes the refusal to testify conclusive, and would disqualify Appellee from party or public office without more. To attach such consequences to invocation of a constitutional privilege is at war with the fundamental concept of the fifth amendment. The distinction has clearly been drawn, in the course of our constitutional history, between permitting a suspect or accused, to take an oath *de veritate dicenda*, that is to tell the truth, and forcing him to do so upon the threat of punishment if he refuses. This latter oath, the oath *ex officio*, was an instrument of Tudor and Stuart tyranny against which Parliament remonstrated in setting aside the sentence of John Lilburn. The proceedings are described in

1 J. Stephen, *A History of the Criminal Law of England* 343-345 (1883):

> "Be this as it may, the extreme unpopularity of the *officio* oath is set in a clear light by the case of John Lilburn. . . . He was committed to the Gatehouse 'for sending of factious and seditious libels out of Holland into England.' He was afterwards ordered by the Privy Council to be examined before the Attorney-General, Sir John Banks. He was accordingly taken to the Attorney-General's chambers, 'and was referred to be examined by Mr. Cockshey his chief clerk; and at our first meeting together he . . . began with me after this manner. Mr. Lilburn, what is your Christian name?' A number of questions followed, gradually leading up to the matter complained of. Lilburn answered a good many of them, but at last refused to go further, saying, 'I know it is warrantable by the law of God, and I think by the law of the land, that I may stand on my just defence, and not answer your interrogatories, and that my accusers ought to be brought face to face, to justify what they accuse me of.' . . . Some days after he was taken to the Star Chamber office that he might enter his appearance. . . . Lilburn thought the object of the examination was to get materials for a bill, and accordingly when the head of the office tendered him the oath 'that you shall make true answer to all things that are asked you,' he refused to do so, saying, first, I am but a young man and do not well know what belongs to the nature of an oath.' Afterwards he said he was not satisfied of the lawfulness of that oath, and after much dispute absolutely refused to take it. After about a fortnight's delay he was brought before the Star Chamber, where the oath was again tendered to him and he again refused it on the ground that it was an oath of inquiry for the lawfulness of which he had no warrant. . . . On the following day they [Lilburn and a fellow prisoner, Wharton] were brought up again. Lilburn declared, on his word and at length, that the charges against him were entirely false, and that the books objected to were imported by another person with whom he had no connection. 'Then,' said the Lord Keeper, 'thou wilt not take the oath and answer truly.' Lilburn repeated that it was an oath of inquiry and that he found no warrant in the word of God for an oath of inquiry. . . . . As both absolutely refused to take the oath they were each sentenced to stand in the pillory, and to pay a fine of £500, and Lilburn to be whipped from the Fleet to the pillory, which stood between Westminster Hall Gate and the Star Chamber. Lilburn was whipped accordingly, receiving, it was said, upwards of 500 lashes, and was made to stand in the pillory for two hours after his whipping. In May, 1641, the House of Commons resolved 'that the sentence of the Star Chamber given against John Lilburn is illegal, and against the liberity of the subject: and also bloody, cruel, barbarous, and tyrannical.'"

See also Lilburn's Case, 3 Cobbett's State Trials 1315 (1637); H. Silving, *The Oath*, 68 Yale L. J. 1329 (1959). *Liburn's Case* has continued to inform this Court's decisions on the central meaning of the privilege against self-accusation. *Miranda* v. *Arizona*, 384 U.S. 436, 459 (1966).[1]

C.

Conclusively to presume guilt from silence would offend the due process clause, a point not reached by

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[1] Oaths of the type demanded of Appellee have often been condemned in our constitutional history. The result, if not the rationale, of *Cummings* v. *Missouri*, 71 U.S. 277 (1867) and *Ex parte Garland*, 71 U.S. 333 (1867) reflect this concern. Alexander Hamilton wrote on this subject: see *Cummings, supra*, 71 U.S. at 330-32.

the court below. Inferences and presumptions are to be given no more weight than reason permits. *Leary* v. *United States,* 395 U.S. 6 (1969); *United States* v. *Romano,* 382 U.S. 136 (1965). As Justice Clark said in *Slochower* v. *Board of Education*, 350 U.S. 551, 557-58 (1956):

> "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' *Brown* v. *Walker*, 161 U.S. 591, 610. We have reaffirmed our faith in this principle recently in *Quinn* v. *United States*, 349 U.S. 155. In *Ullmann* v. *United States*, 350 U.S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege served to protect the innocent who otherwise might be ensnared by ambiguous circumstances. See Griswold, The Fifth Amendment Today (1955)."

In *Baxter* v. *Palmigiano, supra*, this Court distinguished the use of silence as a basis for an inference from its use as a basis for punishment:

> "In this respect, this case is very different from the circumstances before the Court in the Garrity-Lefkowitz decisions, where refusal to submit to interrogation and to waive the Fifth Amendment

> privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogation was treated as a final admission of guilt."

424 U.S. at — (47 L.Ed.2d at 821).

D.

The first amendment freedom of association is also in this case. See *Buckley* v. *Valeo*, 424 U.S. 1 (1976). A political party's organization of its affairs, and even its decisions to commit substantial power to party professionals, are entitled to first amendment protection. *Ripon Society* v. *National Republican Party,* 525 F.2d 567, 585-86 (1975). If party members wish to remove Mr. Cunningham, they have a remedy. *See* New York Election Law § 16. If he is convicted of a crime, his removal will follow. The question here is whether New York may, consistent with the first amendment, place in the hands of the Special Prosecutor, a public official named to his position by a political officer of the competing major party, power to work a forfeiture of the offices to which Appellee was duly elected, and to do so by the simple expedient of offering Appellee a choice between forfeiture and compelled testimony.

Here as elsewhere in the first amendment's domain, the State must seek less onerous alternative means to achieve its objective of rooting out corruption. *United States* v. *Robel,* 389 U.S. 258 (1967); *Schneider* v. *New Jersey,* 308 U.S. 147 (1939).

Moreover, the Appellant's argument that Appellee forfeits his fifth amendment right by exercising his first amendment right to seek office simply cannot bear

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

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Appellant,

against

PATRICK J. CUNNINGHAM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellant,

against

PATRICK J. CUNNINGHAM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

Opinion Below

The opinion of the three-judge District Court dated April 22, 1976 declaring New York Election Law § 22 unconstitutional and enjoining its enforcement as to appellee Cunningham is not yet reported (Appendix to Jurisdictional Statement ["A.J.S."], 1a-20a).

Jurisdiction

The final judgment and order of the District Court was entered April 26, 1976 (A.J.S., 21a). Appellant filed a

notice of appeal to this Court on June 21, 1976 (A.J.S., 22a-24a). The jurisdiction of this Court rests upon 28 U.S.C. § 1253.

The Challenged Statute

New York Election Law § 22 (McKinney's Consolidated Laws of N.Y., Vol. 17, Part 1, p. 36) provides as follows:

> If any party officer shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, grand jury, legislative committee, officer, board or body authorized to conduct any hearing or inquiry concerning the conduct of his party office or the performance of his duties, or having appeared, shall refuse to testify or answer any relevant question, or shall refuse to sign a waiver of immunity against subsequent criminal prosecution, his term or tenure of office shall terminate, such office shall be vacant and he shall be disqualified from holding any party or public office for a period of five years.

Question Presented

1. Does New York's interest in avoiding corruption and the appearance of corruption in its political system permit it to require a prominent, unsalaried political party officer, who refuses to give an official inquiry a full accounting of the conduct of his office, to yield that office?

Statement of the Case

This action was initiated by appellee Patrick J. Cunningham under the Civil Rights Act. 42 U.S.C. § 1983, for declaratory and injunctive relief to invalidate New York Election Law § 22. This statute provides that the refusal of a political party officer to waive immunity against subsequent criminal prosecution before a Grand Jury or any other duly authorized "hearing or inquiry concerning the conduct of his party office or the performance of his duties" automatically terminates his tenure in office and disqualifies him from holding any party or public office for five years thereafter. A party officer is defined by N.Y. Election Law § 2(9) as "one who holds any party position or any party office whether by election, appointment or otherwise".

Appellee (the designation to be applied solely to appellee Cunningham) holds four party offices in the Democratic Party of the State of New York. He is Chairman of the New York State Democratic Committee and the Bronx County Democratic Executive Committee (A. 16)* and is a member of the Executive Committee of the New York State Democratic Committee and the Bronx County Democratic Executive Committee (A. 16).** Each of those positions is a party office as defined by the Election Law. See N.Y. Election Law §§ 2(9), 11, 12 and 15.

As Chairman of the State Committee, appellee is designated and acknowledged as "top leader of the Democratic Party in New York State", *Rules of the Democratic Party of the State of New York ("Democratic Party Rules")* Art. IV, § 1(b)(ii) (see A. 18 *et seq.*). He has the power to select nominees for one of the commissionerships of the state board of election, N.Y. Election Law § 468, which enjoys broad powers of enforcement of the election laws. N.Y. Election Law § 470(a). The State Committee which appellee chairs enjoys the power to designate candidates for statewide office for entry upon party primary ballots, N.Y. Election Law § 131(2), and has the exclusive responsibility to make the nominations of its party for the office

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* "A" refers to the Appendix.

** Neither the New York State Democratic Committee nor the Bronx County Democratic Executive Committee, defendants below, have appealed. Their participation below was merely passive.

of elector of president and vice-president of the United States, N.Y. Election Law § 131(1). As Chairman of the Bronx County Committee, appellee has the duty to certify to the New York City Council the nominee of his committee as commissioner of the New York City board of elections. N.Y. Election Law § 31.* As County Chairman appellee is also authorized to authenticate and file his party's nominees for "election officers" in every election district in Bronx County, N.Y. Election Law § 40; he is also given the power to request the removal of any election officer appointed upon the recommendation of his committee, which request must be honored by the Board of Elections. N.Y. Election Law § 45. In addition, the Bronx County Committee may in most circumstances fill vacancies which occur in party nominations within Bronx County. N.Y. Election Law §§ 131, 140; see *Seergy* v. *Kings County Republican County Committee,* 459 F. 2d 308, 310-11 (2d Cir. 1972). Appellee, however, receives no compensation or salary for any of his party offices, although the State Committee or its Executive Committee has the power to "fix a salary for the Chairman of the State Committee in an amount as may be determined from time to time." *Democratic Party Rules,* Art. VI, § 4. Aside from his party offices appellee is an attorney in active practice (A. 13).

Members of a party's state and county committees are elected biennially by the enrolled voters of the party. N.Y. Election Law § 13. To attain eligibility to vote in a party primary a voter must enroll in that party at least thirty days before the general election held most immediately prior to the primary. N.Y. Election Law §§ 131, 186. See *Rosario* v. *Rockefeller,* 410 U.S. 752, 753-54 (1973).

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* While the right to nominate commissioners of the New York City board of elections is given by statute neutrally to the two political parties receiving the most votes in the last preceding election for governor, N.Y. Election Law § 31, in recent history the Democratic Party has always been one of the two parties to qualify for this power. Commissioners of Election, once appointed, enjoy subpoena power, N.Y. Election Law § 38, and may be removed only by the Governor, N.Y. Election Law § 30.

In late December, 1975, appellee was subpoenaed to appear and testify before an Extraordinary Special Grand Jury for Bronx County, New York (A. 5). This Grand Jury was duly empowered to inquire concerning the conduct of appellee's party offices and the performance of his duties in those offices (A. 15). Appellee sought to quash the subpoena in the New York courts, relying in part on the grounds raised here—the alleged unconstitutionality of N.Y. Election Law § 22 under the First, Fifth and Fourteenth Amendments of the United States Constitution. His efforts in the New York courts were unsuccessful. *Matter of Cunningham* v. *Nadjari,* 51 A D 2d 927 (First Dept.), *aff'd.* 39 N Y 2d 314 (1976).

Following final adjudication of his action to quash the subpoena in the New York courts, appellee attended before the Grand Jury in response to the subpoena, on April 12, 1976. At that time appellee was requested by the Deputy Attorney General in charge of the Investigation of the New York City Criminal Justice System to execute a waiver of immunity to prosecution, and appellee refused to do so.*

On April 13, 1976 appellee commenced this action by order to show cause in the United States District Court for the Southern District of New York. After a hearing the same day, District Judge TENNEY issued a temporary restraining order barring enforcement of N.Y. Election Law § 22 against appellee and barring replacement of appellee in any of his party offices. He also requested the convening of a statutory three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. The statutory court was designated by order of Chief Judge KAUFMAN, U.S.C.A., dated April 14, 1976. Appellee's motion for a preliminary injunction was returnable on April 19, 1976, at which time

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* In the absence of a waiver of immunity, appellee's testimony before the Grand Jury would have entitled him to transactional immunity as to the matters testified upon. N.Y. Criminal Procedure Law §§ 50.10, 190.40, 190.45.

the three-judge court heard oral argument and consolidated the trial of the action on the merits with the application for a preliminary injunction, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure (A. 11). At the hearing, the New York Civil Liberties Union appeared and argued *amicus curiae* in support of appellee's challenge to the constitutionality of N.Y. Election Law § 22.

In an opinion dated April 22, 1976, the District Court held N.Y. Election Law § 22 unconstitutional in violation of appellee's rights under the Fifth and Fourteenth Amendments to the United States Constitution and granted appellee the declaratory and injunctive relief sought in his complaint. The court did not pass on appellee's claim that the challenged statute violated his First Amendment rights. The court relied on *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Spevack* v. *Klein,* 385 U.S. 511 (1967); *Gardner* v. *Broderick,* 392 U.S. 273 (1968); *Uniformed Sanitation Men* v. *Sanitation Commissioner,* 392 U.S. 280 (1968); and *Lefkowitz* v. *Turley,* 414 U.S. 70 (1973), and held that "[s]ection 22 of the New York Election Law is similar in operation to the statutes struck down in the aforementioned cases in that it conditions tenure in office upon the forfeiture of the privilege against self-incrimination. As such, it would appear to fail to measure up to constitutionally established standards." (A.J.S., 11a). Both Judges KAUFMAN and MANSFIELD, in addition to joining in the decision of the District Court, entered separate concurring opinions (A.J.S., 18a-20a).

Summary of Argument

The interest of the State furthered by N.Y. Election Law § 22 is that in safeguarding against corruption and the appearance of corruption in the political system of New York. Section 22 advances this interest by seeking to encourage officers of political parties—who play an integral role in the political system and the electoral proc-

ess—to give an unrestricted accounting of the conduct of their party office. A party officer who declines to give such an accounting puts a cloud over his office and his party. To preserve the confidence of the electorate in the political system and the representative form of government, the State may require that officer to yield his party office in order to remove that cloud.

The interest of the party officer, including appellee Cunningham, in his unsalaried office is non-economic, and the loss of that office imposes no significant cognizable economic sanction upon the officer. He is not denied employment, a professional license, or any business opportunities. If the loss of party office produces any diminution of professional standing or reputation which could be said to have an adverse economic effect on the officer, it would be occasioned by the adverse judgments made by the public with respect to the officer's candor; and it is the danger of those very judgments which requires the State to effect the removal of the officer.

The *Garrity-Lefkowitz* line of cases relied on by the District Court differs from this case in three ways: (1) each involved the imposition of a substantial economic sanction for the exercise of the privilege against self-incrimination; (2) each involved an attempt by the State to use a business relationship with the individual to further a governmental interest unconnected to that relationship; and (3) none of those cases involved a highly visible, unique office which would be put under a cloud by the actions of a non-candid office-holder. In this case the party officer suffers no economic sanction, holds a highly visible office subject to public judgment, and the State is acting in furtherance of its single relationship to the officer.

The Court should apply here the same kind of balancing test as it did in *Baxter* v. *Palmigiano,* 425 U.S. ——, 96 S. Ct. 1551 (1976). The application of that test supports the constitutionality of N.Y. Election Law § 22, since the

effect of the statute on the officer does not amount to coercion of the officer, and the interest of the State here is one that has been recognized as extremely compelling. Not every undesirable consequence following from the exercise of the privilege against self-incrimination is an unconstitutional "penalty".

Nor does § 22 infringe upon the constitutionally protected associational rights of appellee or the members of his political party. A political party and its officers play an important role in the public electoral process and accordingly the State has a right to regulate the conduct of party officers. Freedom of association is not absolute and the State may impose narrowly drawn limitations upon it. N.Y. Election Law § 22 would not prevent appellee from associating with his party, or from speaking, advising or counseling with any person or group. It would only prevent him from holding the formal party or public offices created by New York law. N.Y. Election Law § 22 does not offend the Constitution.

POINT I

New York's interest in avoiding corruption and the appearance of corruption in its political system permits it to require a prominent, unsalaried political party officer, who refuses to give an official inquiry a full accounting of the conduct of his office, to yield that office.

The District Court believed that its decision in this case was "clearly foreordained" (A.J.S., 19a) (KAUFMAN, C.J., concurring) by the holdings of this Court in *Garrity* v. *New Jersey, supra; Spevack* v. *Klein, supra; Gardner* v. *Broderick, supra; Uniformed Sanitation Men* v. *Sanitation Commissioner, supra;* and *Lefkowitz* v. *Turley, supra.* Yet the relationship of the State to the individual litigant in each of those cases, together with the interests the State sought to uphold in each instance, were so significantly

different from those here involved as to permit this Court to examine the present considerations free of the direct precedential constraints of those cases. It is our contention that in all critical respects this case more closely parallels *Baxter* v. *Palmigiano,* 425 U.S. ——, 96 S. Ct. 1551 (1976), in which the balance of interests weighed in favor of the actions of the State. Upon an examination of the considerations here presented, we believe the Court will find that the balance of interests favors the State to such a significant degree as to require reversal of the District Court and the conclusion that New York Election Law § 22 does not offend the Constitution.

A. The interests of the State

The primary interest which New York seeks to uphold in Election Law § 22 is one not present in any of the *Garrity-Lefkowitz* line of cases: it is the interest in safeguarding against both "the reality and appearance of corruption", *Buckley* v. *Valeo,* 424 U.S. 1, 28 (1976), of officers of its political parties. It seeks to guard against the reality of political corruption by encouraging candor on the part of party officers—assured public accounting of the conduct of a party office is an ideal method of discouraging abuse of that office. It also seeks to curb the appearance of corruption of party officers, by requiring that any officer unwilling to give such an accounting, *whether guilty or innocent,* yield his party office. The refusal of a party officer to account for his conduct in office unquestionably puts a cloud over that office. While this Court may forbid the *State* to draw any inference from a party officer's exercise of his Fifth Amendment privilege against self-incrimination, see *Griffin* v. *California,* 380 U.S. 609, 615 (1965), no tribunal can compel the *public at large* to refrain from the virtually inevitable drawing of such an inference. Yet a State, like the Federal Government, must be responsive to its citizenry if "confidence in the system of representative Government is not to be eroded to a disastrous extent". *CSC* v. *Letter Carriers,* 413 U.S. 548,

565 (1973); *Broadrick* v. *Oklahoma,* 413 U.S. 601, 606 (1973); *Buckley* v. *Valeo, supra,* 424 U.S. at 27.

Unfortunately, political corruption is more than an abstract fear. In the realm of corrupt campaign contributions alone, "[a]lthough the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." *Buckley* v. *Valeo, supra,* at 27 (footnote omitted). These exact considerations motivated Congress in 1974 to amend the Federal Election Campaign Act of 1971 to incorporate the most sweeping campaign finance reforms in our nation's history, upheld in large part by this Court in *Buckley* v. *Valeo, supra.* The same year, New York enacted its own campaign finance reform law, N.Y. Election Law Article 16-A, §§ 465 *et seq.,* creating a new state board of election mandated to "maintain citizen confidence in and full participation in the political process of our state to the end that the government of this state be and remain ever responsive to the needs and dictates of its residents in the highest and noblest traditions of a free society." N.Y. Election Law § 466.

The New York Legislature has twice in recent years enacted other legislation in support of the State's interest —which is really the interest of the public—in the accountability of participants in its governmental process. In 1974, the Legislature enacted a Freedom of Information Law, N.Y. Public Officers Law Article 6, §§ 85 *et seq.,* declaring its intent in the following terms: "The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of government actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government." N.Y. Public Officers Law § 85.

In 1976, the Legislature even more strongly affirmed the interest of the public in the accountability of those who

serve it in the governmental process, by enacting an Open Meetings Law, N.Y. Public Officers Law Article 7, §§ 90 *et seq.* (effective Jan. 1, 1977), declaring: "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it." N.Y. Public Officers Law § 90.

New York does not purport to regulate the conduct of its party officers to as great an extent as it does its public officers. The much more modest reach of N.Y. Election Law § 22 is, however, aimed at the same interests reflected in these two more recent, sweeping enactments. By § 22, New York seeks to fulfill its responsibility to preserve the confidence of the public in the system of representative government, and particularly in the political parties which comprise such an integral part of that system. This duty is derived from, among other sources, the Tenth Amendment to the Constitution. See *Oregon* v. *Mitchell,* 400 U.S. 112, 124-25 (Opinion of Black, J.), 207-8 (Opinion of Harlan, J.), 293-94 (Opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.) (1970); also see *Dunn* v. *Blumstein,* 405 U.S. 330, 343-44 (1972). In New York, as noted above, the function of the major political parties is woven into the very fabric of the electoral process. See N.Y. Election Law §§ 30, 31, 40, 45, 131, 140, 468 and 470. Nationally, the two major parties are thought by some to have attained a "permanently preferred position", *Buckley* v. *Valeo, supra,* at 293 (Opinion of Rehnquist, J.). N.Y. Election Law § 22 prevents a party officer like appellee from putting a cloud over his office and his party, requiring of that officer either that

he candidly account for the conduct of his office or that he yield his office and pursue his constitutional rights, including an unfettered privilege against self-incrimination, as a private citizen. Once he is out of office the State is constrained to conduct any criminal investigation of him in the same manner as it would with any citizen. Yet, at the same time, the State has achieved its purpose of removing from a party office—and a party—even the appearance of corruption or impropriety.*

Nor is the answer to the State's need for a full accounting by its party officers simply to immunize those officers from prosecution for the misdeeds thus brought to light.** The responsibility of the State to the public extends not merely to obtaining a full accounting by party officers, but also to punishing those who abuse their trust and transgress the law. Plainly, the great indignation and outrage with which our nation's citizens reacted to the Watergate episode would have been inflamed rather than quieted if the price of uncovering the true extent of the misdeeds there committed had been full immunity from prosecution for the wrongdoers.*** A State forced to choose between

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* It would seem that appellee himself is not oblivious to the State interests noted here. Following the decision of the District Court in this case, appellee was in fact indicted for "conduct in which he allegedly engaged while a party official." Appellee's Motion to Dismiss or Affirm at 8. Subsequent to his indictment, appellee voluntarily suspended himself from his duties as State Chairman, although apparently retaining the office itself. He remains in that status to the date of this writing.

** As noted previously, New York confers not merely "use" immunity but "transactional" immunity upon Grand Jury witnesses in the absence of a waiver.

*** It is noteworthy that none of the high officials called to testify under oath at the Senate Watergate Committee hearings in 1973 invoked a claim of Fifth Amendment privilege. They no doubt recognized the strong likelihood of an adverse public reaction to any assertion of such a claim. Indeed, the question may hypothetically be posed whether the District Court's rationale in this case might not be so far-reaching as to prohibit a President or other executive officer from suspending or firing a trusted aide who invoked his Fifth Amendment privilege to avoid testifying under oath concerning his official duties.

an accounting from or a prosecution of a party officer is in an intolerable position—to choose an accounting at the expense of prosecution is akin to converting party office into a virtual license to steal for those inclined to dishonesty; to opt for prosecution is to deny the public (including members of the officer's party) the most fundamental information about the officer's discharge of the public and party duties accruing to his office. The *State* would thus be placed "between the rock and the whirlpool", *Garrity, supra*, 385 U.S. at 498, in discharging its duty to maintain the confidence of the public in its political system. It should not be required to make that Hobson's choice.

B. The interests of the party officer

Appellee receives no salary from any of the party offices he holds. He is an attorney and earns his living from a law practice in New York City. Thus the operation of N.Y. Election Law § 22 upon appellee would deprive him of no direct economic benefit (A.J.S., 13a). The District Court, however, perceived an economic effect upon appellee in three ways. First, it noted that § 22 also bars appellee from public office for five years, and that public offices are normally salaried (A.J.S., 14a). Yet appellee holds no public office (and indeed his right to hold such office while retaining his party offices is restricted, see N.Y. Public Officers Law § 73[8]). Thus appellee has no "legitimate claim of entitlement", *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), to any public office, and enjoys no property right to such an office which is cognizable under the Constitution. The loss of the opportunity for a finite period of time to attain a benefit to which he has no right cannot realistically be found to constitute a substantial economic effect.*

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* In addition, a State may properly burden one seeking to obtain a benefit via strictures impermissible as to one already enjoying that benefit. Compare *Lavine* v. *Milne*, 424 U.S. 577, 587 (1976) with *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

The District Court also noted the possibility that the Democratic State Committee might vote appellee a salary as State Chairman, which it is empowered to do under the Democratic Party Rules. Nothing in the record supports the likelihood of this occurrence, and mere speculation by the District Court does not translate into a significant economic effect upon appellee. Nor is there any indication in the record that appellee could not obtain equivalent remuneration elsewhere if he were in fact deprived of a salaried party office; nor that his private law practice could not produce equivalent compensation for an equivalent time commitment.

Finally, the District Court stated that "[w]e would, moreover, be naive if we did not recognize the inevitable economic impact upon Cunningham, a practicing attorney, concomitant with being forced out, under a cloud, of the state party chairmanship" (A.J.S., 14a). The District Court thereby imputed to the State the very judgment by the public which N.Y. Election Law § 22 is intended to avoid with respect to party officers. If appellee's law practice were to suffer after yielding his party office, it would be by reason of the adverse judgments made of him by his clients and potential clients, not by the State. The State is not responsible for—and can do nothing to control—those judgments by the public. The "cloud" pictured by the District Court is created solely by appellee's refusal to give a full accounting of the conduct of his party offices, and any adverse conclusions drawn from that refusal by the public cannot be attributed to the State. Indeed, as observed, those are the very judgments which impel the State to deny continuation in office to any party officer whose conduct gives rise to such judgments.

Since the loss of party office yields no economic consequences attributable to the State, the party officer's interest in his office must be measured in terms of non-economic concepts such as "professional standing" and "reputation"

(A.J.S., 14a). The District Court attempted to use *Spevack* v. *Klein, supra,* to show that infringement of these interests alone was sufficient to invalidate the challenged statute. *Spevack* involved the attempted disbarment of an attorney for invoking his privilege against self-incrimination at a disciplinary proceeding. *Spevack* v. *Klein, supra,* 385 U.S. at 513. Yet this comparison fails because it is clear that in *Spevack* the loss of professional standing and reputation came as a *direct result* of the serious economic loss imposed there (disbarment from the legal profession). *Id.* at 516. Without disbarment there would be no loss of professional standing or reputation, and the significance of those interests standing alone was in no way measured in *Spevack.* Further, of course, professional standing and reputation may well translate into an economic value for a practicing attorney, who is engaged in a remunerative endeavor. Since appellee is not compensated for his party offices, the asserted loss of professional standing and reputation *in those offices* could have no cognizable economic consequence to him. Lastly, once again, any such loss of professional standing or reputation occurring to appellee is due to the adverse judgments of the public at large, rather than to any instrumentality of the State. The State draws no inference from the yielding of a party office; any inferences drawn by the people will be decided in the public arena, far beyond the purview of the State.*

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* Even injury to appellee's reputation directly produced by actions taken under color of state law would not deprive him of any interest protected by the Constitution. *Paul* v. *Davis,* 424 U.S. 693, 712 (1976). Thus, for instance, the State could certainly publish a list of the names of party officers invoking their privilege against self-incrimination before a duly authorized inquiry. See *id.* at 697, 712. What the State may do directly is not rendered impermissible because it is attained by indirection. Cf. *Speiser* v. *Randall,* 357 U.S. 513 (1958). But at the same time the State may not produce certain otherwise permissible harms on a basis that infringes on a constitutionally protected right such as freedom of speech. *Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972).

C. The balance of interests presented in this case supports the constitutionality of New York Election Law § 22

The District Court concluded, erroneously in our view, that the *Garrity-Lefkowitz* line of cases controlled this action. A review of those cases shows otherwise. In *Garrity,* 385 U.S. 493, the Attorney General of New Jersey sought to question several police officers in connection with an investigation into the alleged fixing of traffic tickets. *Id.* at 494. Before questioning, the officers were warned that anything they said could be used against them and that their failure to answer any question through invocation of their privilege against self-incrimination would lead to removal from office. *Ibid.* The officers answered the questions, and were convicted in subsequent prosecutions in which their answers were used against them. This Court ultimately reversed the convictions on the ground that a state may not "use the threat of discharge to secure incriminatory evidence against an employee", *id.* at 499, and that "the Fourteenth Amendment . . . prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office. . . ." *Id.* at 500.

In *Spevack,* 385 U.S. 511, as noted above, an attorney licensed by the State of New York to practice law was called before a disciplinary proceeding and declined to produce subpoenaed financial records on Fifth Amendment grounds. He was subsequently disbarred because of that refusal. *Id.* at 512-13. The documents sought in the disciplinary proceeding related to "detailed financial aspects of contingent-fee litigation". *Id.* at 517. The Court held the disbarment unconstitutional because "[t]he threat of disbarment" was too "powerful an instrument of compulsion" of self-incriminating evidence and violated the privilege against self-incrimination. *Ibid.*

Next in line was *Gardner,* 392 U.S. 273, in which a police officer was called before a grand jury investigating alleged

bribery and corruption of police officers in connection with unlawful gambling operations. The officer declined to execute a waiver of immunity and after a hearing was discharged solely for that refusal. *Id.* at 274-75. The New York courts upheld the discharge but this Court reversed, holding that the privilege against self-incrimination does not permit the State "to coerce a waiver of the immunity it confers on penalty of the loss of employment". *Id.* at 279.

In *Uniformed Sanitation Men,* 392 U.S. 280, a number of municipal sanitation workers were called to testify before the Commissioner of Investigation of the City of New York, who was investigating charges that employees of the Department of Sanitation were charging improper fees and were diverting to themselves the proceeds of fees that they did charge. *Id.* at 281. Twelve of the employees declined to testify on Fifth Amendment grounds and were discharged for that reason. *Id.* at 282. The Court held the discharges unconstitutional because they resulted from forcing upon the employees "a choice between surrendering their constitutional rights or their jobs." *Id.* at 284.

Most recently, in *Lefkowitz,* 414 U.S. 70, two contractors doing business with the State of New York were called before a grand jury investigating charges of conspiracy, bribery and larceny, and they declined to execute waivers of immunity. State law and a required provision of their public contracts imposed upon them a five year disqualification from public contracting and the optional cancellation of existing contracts as a result of their refusal to execute the waivers. The Court held the disqualification and cancellation provision unconstitutional on the ground that the waiver, and thus the testimony, obtained by the operation of those provisions would have been compelled in violation of the privilege against self-incrimination, and that "[a] waiver secured under threat of substantial economic sanction cannot be termed voluntary". *Id.* at 82-83.

Each of the *Garrity-Lefkowitz* line of cases shares three outstanding characteristics which sharply distinguish them from this case. First, in each case the State had sought to utilize the coercive power of its relationship to the individual in its capacity as *employer* (in *Garrity, Gardner, Sanitation Men* and, in a practical sense, *Lefkowitz*) or *business regulator* (in *Spevack*) to assist it in its capacity as *lawmaker* and *law enforcer*. This was held to be an unfair abuse of the power it happened to enjoy over each individual—by reason of what was at bottom a contractual, business relationship—to achieve an end to which the business relationship was irrelevant. This overlap of roles is shown most clearly in *Lefkowitz*, in which the State's interest in the honesty of its contractors—who are private businessmen—was virtually the same as its interest in preventing crime generally among private citizens; in *Spevack*, in which the attorney was a private citizen in every respect but that his profession is licensed by the State;* and in *Sanitation Men*, in which the alleged crimes under investigation did not turn in a substantial way on the public nature of the employee's work (the diverting of an employer's income is illegal wherever it occurs). The overlap is less compelling in *Garrity* and *Gardner* because the investigations turned on performance of functions unique to the duties of police officers (unlike *Sanitation Men*) and thus bore more centrally on the officer's performance in the employer-employee relationship. Yet even there the State as employer could have settled for immunized testimony, but chose to forego that option to preserve its rights as law enforcer. Since the limits imposed by the Constitution on the actions of the State "may

* This statement does not imply that the State has no interest in upholding the integrity of the legal profession—to the contrary, it has such an interest at least as much or even more than as to other forms of regulated business activity. *Cf. Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). That interest, however, is less compelling than the interests at stake in this case.

vary in their stringency depending on the capacity in which the government is active", *Buckley* v. *Valeo, supra*, 424 U.S. at 290 (Opinion of REHNQUIST, J.); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), the State ought not utilize its power in one capacity to attain an end not permitted to it in another capacity. Each of the *Garrity-Lefkowitz* line of cases stands for this principle to a varying but considerable degree.

The second common characteristic of the *Garrity-Lefkowitz* line of cases is that none of these cases involved an individual holding a uniquely titled office readily differentiated in the mind of the public from any other office. In *Lefkowitz* and *Spevack* the individuals held no office whatever—they were private citizens. In *Sanitation Men* the individuals were employed by the State but held no public office. In *Gardner* the individual was a police officer who, it is true, held a position of trust, but he had no individual identity to the public as a police officer. The public coming in contact with Officer Gardner would have no particular method of singling him out from the next officer nor of knowing that this particular individual had failed to give a full accounting of his conduct as a police officer. In short, he put no cloud over his office in the public mind by his refusal to testify. Similarly, in *Garrity*, all but one of the questioned individuals were ordinary police officers whose actions placed no cloud over a particular office. While Garrity himself was the chief of police of the Borough of Bellmawr, New Jersey, it is significant that the opinion of the Court made no reference whatever to this fact; it is brought out only in Justice HARLAN's dissent (*Garrity*, 385 U.S. at 502). Thus the majority opinion in *Garrity*, as in all the other cases in that line, is predicated on a fact pattern reflecting the absence of an individual holding any particular identifiable office, whose actions in declining to account for his conduct in that office might draw public discredit to it.

The third and final characteristic shared by the *Garrity-Lefkowitz* line of cases is the most apparent—the substantial economic harm visited upon each of the affected individuals resulting from the invocation of his privilege against self-incrimination. In *Spevack, Gardner* and *Sanitation Men* the individuals lost their very livelihood along with whatever pension and other ancillary benefits attended these positions. In *Garrity* the threat of denial of livelihood was the same, though not actually invoked. In *Lefkowitz,* the contractors lost the opportunity to do business with the State and the Court observed that "[w]e fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor." *Lefkowitz,* 414 U.S. at 83 (footnote omitted).

The present case contains none of the three characteristics common to the *Garrity-Lefkowitz* line of cases. First, the relationship of the State to its party officers is not bifurcated—it is the single, unitary one it holds as guarantor of a political system free of the appearance and reality of corruption. The State does not wear two hats in its dealings with party officers; its interest is the same at all times. The key to the unitary nature of this relationship is that the State's capacity as political guarantor *incorporates* its capacity as law enforcer as to party officers. Its only requirement of party officers is obedience to the law in the discharge of party office. N.Y. Election Law § 22 does not permit the State to inquire as to activities outside the scope of party office; it seeks unrestricted inquiry only as to the performance and conduct of the office. Accountability is desirable because it produces, among other benefits, obedience to the law; that belief is one of the premises of our political system. Thus N.Y. Election Law § 22 is not an instrument by which the State unfairly utilizes one relationship to further its purposes in another, unrelated capacity. Rather, it seeks to further the State's only interest in relation to party officers.•

Secondly, it is clear that Mr. Cunningham does hold the kind of highly visible, identifiable, differentiated office missing from the *Garrity-Lefkowitz* line of cases. He is "the top leader of the Democratic Party in New York State", *Democratic Party Rules*, Art. IV § 1(b)(ii), and as such enjoys enormous visibility in the public eye.•• As Bronx County Chairman he is also prominent in the political affairs of New York City. Thus the failure of such a prominent officeholder to give a full accounting of his conduct as State and County Chairman can have the effect of creating doubt and suspicion in the public eye as to the honesty and reliability of the officeholder and thus the office itself and the party he represents. It is precisely in that circumstance that the State's interest in preserving

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• The existence of an unchallengeably valid state interest sought to be attained through N.Y. Election Law § 22 clearly distinguishes it from what the Court has at least on one occasion described as the purpose of the statutes challenged in *Sanitation Men* and *Gardner*. The Court used the language of *United States* v. *Jackson*, 390 U.S. 570, 581 (1968), to describe those provisions as having *"no other purpose or effect* than to chill the assertion of constitutional rights by penalizing those who choose to exercise them." *Fuller* v. *Oregon*, 417 U.S. 40, 54 (1974) (emphasis supplied).

•• As State Chairman Mr. Cunningham enjoys the power, *inter alia*, "to convene periodic meetings with the Democratic leaders of the Legislature in Albany and with Democratic members of the New York State Congressional Delegation in Washington in order to translate the views of the State Party on substantive issues into public policy and to inspire and mobilize vigorous public and party support of all major legislation which implements the New York State Democratic Party platform and progress, and to challenge or expose the errors or inadequacies of the Republican Governor and other Republican officials of the State." *Democratic Party Rules*, Art. IV § 1(b)(iii).

the confidence of the electorate in the political system may be most strongly asserted.*

The final distinction between this case and the *Garrity-Lefkowitz* cases, as has been noted, is the absence here of any significant economic deprivation to appellee resulting from his invocation of his privilege against self-incrimination. Appellee's professional status and his ability to earn a living in his chosen occupation remain unimpaired.

The foregoing comparison of the present case with the *Garrity-Lefkowitz* line of cases is intended to show that the factors which supported rejection of the actions of the State in those cases are simply not present here. N.Y. Election Law § 22 imposes no economic sanction upon the exercise of the privilege against self-incrimination, applies only to indentifiable party offices,** and does not involve

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* The present Chief Judge of the New York Court of Appeals has observed that "[t]he lowness in rank of the officer involved is not unimportant. One is entitled to doubt that the Supreme Court would find it coercive to require a Judge, a ranking executive officer or a member of the Legislature to surrender his privilege against self-incrimination in order to qualify for or retain his office". *People* v. *Avant*, 33 N Y 2d 265, 274 (1973) (BREITEL, J., concurring). The District Court rejected this view with the observation that it found "no merit in the suggestion that advancement in office diminishes one's constitutional rights." A.J.S., 12a. Appellant makes no such argument; we contend rather that one's responsibilities while in party office increase with the importance and degree of public trust reposed in that office.

** Even the office of county committee member is identifiable and differentiated; each such officer is elected to his or her post at primary elections by enrolled party members in his election district. See N.Y. Election Law §§ 12, 13. Whether or not different considerations would enter into a claim of privilege by a county committee member, no such question is presented here. This is not a class action, and appellee has sought and received from the District Court relief from the enforcement of N.Y. Election Law § 22 only as to himself. A.J.S., 21a.

improper interaction between two unrelated capacities of government. While the legitimate concerns of the State reflected in N.Y. Election Law § 22 are significantly greater and different than those in the *Garrity-Lefkowitz* cases, the effect of the statute on the appellee is of a much smaller degree. This balance of interests sufficiently favors the compelling interests of the State to require the upholding of N.Y. Election Law § 22 under the Constitution, and the reversal of the District Court.

The absence of harmful economic effect from the operation of § 22 is particularly significant, for it was the "threat of substantial economic sanction," *Lefkowitz* at 82, in each of the *Garrity-Lefkowitz* cases which grounded the holding of the Court that the statutes in question imposed "powerful forms of compulsion", *Spevack* at 516, which would render any testimony given thereunder inadmissible. While *Garrity* involved actual testimony and may have been based on a finding of involuntariness as a matter of fact, see *Garrity* at 502-06 (HARLAN, J., dissenting); *United States* v. *Solomon*, 509 F. 2d 863, 871 (2d Cir. 1975); *United States ex rel. Sanney* v. *Montanye*, 500 F. 2d 411 (2d Cir.), *cert. den. sub nom. Sanney* v. *Smith*, 419 U.S. 1027 (1974), the subsequent cases in that line established a *per se* rule that such testimony, if so compelled, would be involuntary as a matter of law. In the absence of a "substantial economic sanction", such an extraordinary *per se* rule would appear to be clearly unjustified.

The District Court decided, however, not only that the existence of a "substantial economic sanction" was irrelevant to the constitutionality of the statute, but that *any* statute "designed to elicit testimony . . . must be coercive or punitive for the statute to be effective." A.J.S., 13a. The District Court thus departed from established law requiring the court in each case to examine the effect of a challenged statute or procedure to determine if its impact upon a witness' Fifth Amendment rights assumes the dimension of a "penalty" in the constitutional sense. "[N]ot every undesirable consequence which may follow from the

exercise of the privilege against self-incrimination can be characterized as a penalty." *Flint* v. *Mullen,* 499 F. 2d 100, 104 (1st Cir.), *cert. den.* 419 U.S. 1026 (1974) (risk of adverse judgment in deferred sentence violation proceeding is not penalty for exercise of Fifth Amendment privilege). This Court has employed a similar standard to determine the contours of a "penalty" in the constitutional sense. See *Garner* v. *United States,* 424 U.S. 648, 661-65 (1976) (threat of prosecution for mistaken claim of privilege against self-incrimination not a penalty in constitutional sense); *Campbell Painting Corp.* v. *Reid,* 392 U.S. 286 (1968) (threat of indirect economic harm through diminution of value of stock not penalty for stockholder's claim of privilege against self-incrimination); also see *Fuller* v. *Oregon,* 417 U.S. 40, 54 (1974) (statute imposing obligation to repay when possible the cost of free legal counsel provided to indigent defendant is not penalty for exercise of Sixth Amendment right to counsel); *United States* v. *Solomon, supra,* 509 F. 2d at 872 (threat of possible disciplinary action by New York Stock Exchange against member not sufficient penalty to constitute coercion of testimony); *United States ex rel. Sanney* v. *Montanye, supra,* 500 F. 2d at 415 (threat of loss of job as driver's assistant held one or two days not sufficient penalty to constitute coercion of testimony); *United States* v. *Moeller,* 402 F. Supp. 50, 55-56 (D. Conn. 1975) (testimony given under threat of possible denial of insurance recovery for fire loss not coerced).

The Court reaffirmed this principle most recently in *Baxter* v. *Palmigiano,* 425 U.S. ——, 96 S. Ct. 1551 (1976). In *Baxter,* a prisoner charged with disruption of prison operations was summoned to a disciplinary proceeding and informed that he was not required to testify and could remain silent, but that his silence could be used against him in support of an adverse decision by the disciplinary board. *Id.,* 96 S.Ct. at 1555. The prisoner chose to remain silent, was found guilty of the charges, and received punishment of 30 days in punitive segregation. The Court upheld the punishment and the use of the inference drawn from the inmate's silence, characterizing a disciplinary proceeding as "involv[ing] the correctional process and important state interests other than conviction for crime". *Id.,* 96 S. Ct. at 1558. The price of the prisoner's exercise of his Fifth Amendment privilege was the use of a resulting adverse inference against him; but this price was not a penalty in the constitutional sense in view of the important state interests at stake in the disciplinary proceeding. The Court distinguished the *Garrity-Lefkowitz* line of cases on the ground that they each involved a "serious economic reprisal" for the claim of Fifth Amendment privilege. *Id.,* 96 S. Ct. at 1557.

The Court in *Baxter* also distinguished the *Garrity-Lefkowitz* cases on the ground that in each case "failure to respond to interrogation was treated as a final admission of guilt". *Id.,* 96 S. Ct. 1557. In one sense the instant case differs from *Baxter* and matches the *Garrity-Lefkowitz* line, in that undisputedly the invocation of the Fifth Amendment privilege, without more, results in the loss of party office. Yet, in a more proper sense, this case does fall within the ambit of *Baxter* because, as has been shown, no punishment is imposed for which an "admission of guilt" has any relevance. Certainly the State draws no inference of guilt of whatever possible criminal offenses underlie the inquiry. Nor is there a finding of unfitness for a profession or job. Rather, the party officer's claim of Fifth Amendment privilege does no more than "admit" that he is unwilling to give a full accounting of his performance and conduct of his party office. That "admission" is conclusively and necessarily correct,* and no other admission is made, nor inference drawn.

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* It is the conclusive and self-evident nature of this admission which obviates the need for a hearing or other due process protections prior to the officer's removal from office. Cf. *Wolff* v. *McDonnell,* 418 U.S. 539 (1974); *Board of Regents* v. *Roth, supra; Goldberg* v. *Kelly, supra.*

In sum, N.Y. Election Law § 22 does not infringe upon the exercise of the privilege against self-incrimination by the officers of its political parties. It places no unfair burden whatever upon the exercise of that privilege. It simply offers the party officer a choice between two alternatives: the rendering of a full accounting of the conduct of his party office and the performance of his duties without exercise of the privilege; or the yielding of his party office and the public trust reposed therein, and the opportunity to exercise the privilege, as well as all other constitutional rights and privileges, as a private individual. It is not a choice attended by coercion or duress, see *United States* v. *Solomon, supra,* 509 F. 2d at 872, and neither choice results in the loss of any significant economic benefit to the officer. By offering this choice New York meets all its obligations to its citizens—it strives to assure a political system free of the appearance of corruption as well as the reality of corruption, thereby fulfilling its most fundamental duty to retain the confidence of its citizens in the political system and the representative form of government; it also preserves the unfettered ability of all its citizens, including its political party officers, to exercise the rights secured to them by the Constitution. N.Y. Election Law § 22 is a proper, reasonable and fair enactment, and should be upheld.

POINT II

New York Election Law § 22 does not infringe upon the constitutionally protected freedom of association of appellee or the members of his party.

The appellee, supported by the *amicus curiae,* sought in the District Court to challenge N.Y. Election Law § 22 as violative of appellee's rights protected under the First Amendment as well as the Fifth Amendment (both applicable to the States through the Fourteenth Amendment). The District Court did not reach the First Amendment

claim, relying solely on the Fifth Amendment claim to invalidate the statute. Since appellant has contended that the District Court erred in its resolution of that claim, a separate discussion of appellee's First Amendment claim is appropriate.

A political party performs a mixture of public and private functions. It discharges certain public functions such as the selection of nominees for elective office, and in that capacity acts as an arm of the State subject to regulation by the State. *Smith* v. *Allright,* 321 U.S. 649 (1944); *Kusper* v. *Pontikes,* 414 U.S. 51 (1973); *Terry* v. *Adams,* 345 U.S. 461 (1953). The public responsibilties of political party officers in New York have been set forth above; they include the selection of commissioners of the Board of Elections and of election officers, as well as the nomination of candidates in some circumstances. See pp. 3-4, *supra.* At the same time, a political party also has many of the attributes of a private organization and as such "enjoy[s] a constitutionally protected right of political association." *Cousins* v. *Wigoda,* 419 U.S. 477, 487 (1975); *Kusper* v. *Pontikes, supra.* The validity of any State statute regulating a political party turns on the function of the party being subjected to regulation and the actual effect of the statute on the party, as well as on the interest being promoted by the State through the statute. In this case, of course, the interest New York seeks to promote through Election Law § 22 is that discussed at the outset of Point I, *supra.* That interest carries as much force in the First Amendment context as in that of the Fifth Amendment, and supports the constitutionality of Election Law § 22 in this context as well.

The contention was raised below that *Cousins* v. *Wigoda, supra,* requires that § 22 be struck down. In *Cousins,* the 1972 Democratic National Convention had voted to seat a group of "insurgent" Illinois delegates in place of those chosen by the Democratic electorate in the party primary.

An Illinois judge enjoined the insurgents from taking their seats at the convention, they ignored the injunction, and the state court found them in contempt of the injunction. *Cousins, supra,* at 478-484. This Court reversed the decision of the Illinois courts, holding that the importance of the function of the national political parties in the presidential nominating process was so great as to outweigh Illinois' interest in the integrity of its electoral process. *Id.* at 490-91. The Court held that the convention itself, rather than the state courts, was " 'the proper forum for determining intra-party disputes as to which delegates [should] be seated'. *O'Brien* v. *Brown,* 409 U.S. 1, 34 L. ed 2d 1, 92 S. Ct. 2718 (1972)." *Id.* at 491.

In *Cousins,* the delegates' only function related to the internal operation of the Democratic Party in the process by which it selects a presidential candidate. The delegates performed no official function; rather they were chosen by Democrats to meet with other Democrats to select a Democratic presidential candidate. The states have no "constitutionally mandated role", *id.* at 489, in the selection of a party's presidential candidate, and no interest in the outcome or procedure of the convention.

In this case, as shown above, New York does have a substantial interest in the conduct of its party officers.* Where political party officers "perform public electoral functions . . . [they are] unquestionably playing an integral part in the state scheme of public elections." *Seergy* v. *Kings County Republican County Committee, supra,* 459 F.2d at 314. That role should and must be subject to control by the State. *Smith* v. *Allright, supra; Davis* v. *Schnell,* 81 F. Supp. 872 (D. Ala.), *aff'd.* 336 U.S. 933 (1949). The argument is raised that since party officers

* It should be noted, for instance, that candidates for party office, as well as party committees, are subject to the campaign contribution and expenditures limitations of Article 16-A of the Election Law. See N.Y. Election Law § 479.

may spend much more of their time on internal party affairs than on their public electoral functions, the State may not infringe on their ability to hold party office. Yet this argument, if accepted, would prove too much: taken to its logical conclusion it would force the State to accept anyone in party office—an individual not eligible to vote, a child, or an alien. In effect, the State would lose its unquestioned right to control the electoral process, and the party's freedom of association would become absolute.

"Yet, it is clear that '[n]either the right to associate nor the right to participate in political activities is absolute.' [citation omitted]. Even a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley* v. *Valeo, supra,* 424 U.S. at 25. Further, of course, Election Law § 22 poses no threat to appellee's rights to associate with the Democratic party or any other group of his choosing; he may speak, advise, counsel and confer with any person, body or committee he wishes. He may be prohibited, under Election Law § 22, only from holding the formal party offices created by New York law and conferred with responsibility for significant public electoral functions. Thus, N.Y. Election Law § 22 does not infringe on the constitutionally protected associational freedoms of appellee or members of his party.

CONCLUSION

The order and judgment of the District Court should be reversed and the complaint dismissed in all respects.

Dated, New York, New York
November 30, 1976

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-260

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Appellant*,

v.

PATRICK J. CUNNINGHAM, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLEE CUNNINGHAM

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IN THE

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OCTOBER TERM, 1976

No. 76-260

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Appellant,*

v.

PATRICK J. CUNNINGHAM, *et al., Appellees.*

On Appeal from the United States District Court for the Southern District of New York

---

BRIEF FOR APPELLEE CUNNINGHAM

COUNTERSTATEMENT OF THE CASE

The bare outline of procedural events and of statutory provisions in the appellant's Statement is accurate, so far as it goes.

Appellee Patrick J. Cunningham is indeed a party officer, being a member and chairman of the State and Bronx County Democratic Committees. He was elected by the suffrage of enrolled members of the Democratic

Party. N.Y. Election Law §§ 12, 13, 15; Rules of the Democratic Party of New York, Art. II, § 1, Appendix, p. 37. New York law requires that he be an enrolled Democratic Party voter in order to be eligible to serve on the respective committees. N.Y. Election Law § 12.

The Democratic Party in New York fulfills, as appellant's brief points out, some public functions. It is, however, principally a private political organization. As the Court of Appeals for the Second Circuit said in describing the functions of the Kings County Republican Committee:

> "Except in rare instances the county committee does not perform any electoral functions on behalf of its enrolled party members. Its function is essentially to handle the party's internal affairs at the county level, including the promotion of Republican candidates and policies for consideration by its members, development of party programs, solicitation of uncommitted voters to enroll in the Republican Party, raising of campaign funds, manning of the polls at election time, distribution of party literature, canvassing voters, electioneering, and similar activities."

Seergy v. *Kings County Republican Committee,* 459 F.2d 308, 310 (2d Cir. 1972).

Beginning in late 1975, the Deputy Attorney General in charge of investigating New York's criminal justice system began actively to criticize New York Governor Hugh Carey and persons associated with him, including appellee. The Deputy, Maurice Nadjari, who was the prosecutor who demanded in the secrecy of the grand jury that appellee execute a waiver of immunity, had been appointed during the administration of Gov-

ernor Nelson Rockefeller, a member of the same political party as appellant Lefkowitz. See generally R. Pitler, *Superseding the District Attorneys in New York City—the Constitutionality and Legality of Executive Order No. 55,* 41 Fordham L. Rev. 517 (1973). Mr. Nadjari carried the title Special Prosecutor.

On December 23, 1975, Governor Carey had announced his intention to replace Mr. Nadjari as Special Prosecutor with Robert Morgenthau, District Attorney of New York County and former United States Attorney for the Southern District of New York.[1] This choice was Governor Carey's to make. N.Y. Executive Law § 63, subd. 2.

Mr. Nadjari promptly began to supply information to the press, by public statements and by leaks, to the effect that Governor Carey was participating in a "cover up" and that appellee was a criminal. See *Report of an Investigation of Charges Made by Special Prosecutor Maurice H. Nadjari Concerning Governor Hugh L. Carey,* issued June 21, 1976, by Special Deputy Attorney General Jacob Grumet; New York Times, Dec. 26, 1975, p. 1, col. 8. The allegations concerning appellee, against whom no formal charges had ever been made, reflected a consistent practice of Mr. Nadjari's office, termed "a pattern of deliberate transgression and failed responsibility" on the part of Mr. Nadjari and his chief assistant. State of New York, Commission on Investigation, "The Nadjari Office and the Press," November 18, 1976, p. 5. See generally A. Lewis, *The Zeal of Maurice Nadjari,* New York Times Magazine, March 28, 1976, p. 15.

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[1] In fact, Mr. Nadjari was eventually replaced by John F. Keenan, the present Special Prosecutor.

Mr. Nadjari went so far as to file an affidavit stating that appellee was "at the center of the corrupt marketplace for judgeships," which was reported in a number of New York City newspapers. See, *e.g.*, New York Times, Jan. 7, 1976, p. 1; New York Daily News, Jan. 7, 1976, p. 1; New York Post, Jan. 6, 1976, p. 1. Having thus publicly denounced appellee for selling judgeships and for political corruption, Nadjari finally used the authority of his office to procure two indictments against appellee embodying the charges he had made.

On December 22, 1976, Judge Leonard H. Sandler, in a 26-page opinion, dismissed the indictments on a number of grounds, including lack of any evidence that Mr. Cunningham or the Bronx County Democratic Committee had ever received any money as a *quid pro quo* for supporting the nomination of a judge. With specific reference to Mr. Nadjari's "corrupt marketplace" allegation, Judge Sandler said:

> "[B]asic fairness requires it to be said explicitly, as indisputably established by the record of these Grand Jury proceedings, that this charge was not justified by the evidence then at his disposal, and was not substantiated by the investigation that followed."

People v. *Cunningham*, slip op., p. 25, — Misc.2d —, — N.Y.S.2d — (1976), N.Y. Law Journal, Dec. 23, 1976, p. 12, at p. 13.

On April 12, 1976, Mr. Cunningham appeared before a grand jury conducted by Mr. Nadjari. He was tendered a waiver of immunity and refused to sign it. The record does not reflect that Mr. Cunningham was ever asked a single question relating to his conduct as a party officer. Mr. Cunningham was not asked whether

or not he would testify under a grant of use immunity of the type set forth in *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 426 F.2d 619, 621 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972), nor was any attempt made, of the type set forth in that opinion, to confer such limited immunity.

The present lawsuit followed, and a unanimous three-judge court invalidated the provisions of N.Y. Election Law § 22.

SUMMARY OF ARGUMENT

This case is ruled by this Court's consistent course of decision invalidating statutes cast from the same mold as N.Y. Election Law § 22. The most recent such case is *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), in which the Court rejected the same arguments advanced by appellant here, and expressly noted that the State's concerns could be accommodated by tendering use immunity to the witness in such situations.

The determination of the three-judge court is particularly appropriate in a case such as this, in which a political appointee—Deputy Attorney General Nadjari—sought to use N.Y. Election Law § 22 to work an automatic forfeiture of party offices to which appellee was elected by the suffrage of his fellow Democrats. Substantial first amendment questions of state interference in the activities of political parties are therefore raised by the statute.

Appellee also notes that the automatic, conclusive presumption of unfitness from refusal to sign a waiver of immunity falls afoul of this Court's decision in *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), as well as of this Court's consistent refusal to validate presumptions which are conclusive or those which are irrational.

ARGUMENT

I. The Three-Judge Court Was Correct in Regarding This Case as Controlled by the Line of Authority Extending from Garrity v. New Jersey, 385 U.S. 493 (1967), to Lefkowitz v. Turley, 414 U.S. 70 (1973).

The statute at issue here is substantially the same as those construed in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), *Gardner* v. *Broderick*, 392 U.S. 273 (1968), *Uniformed Sanitation Men Ass'n* v. *Commissioner*, 392 U.S. 280 (1968), and *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973). See also *Spevack* v. *Klein*, 385 U.S. 511 (1967). Indeed, the statutes invalidated in *Gardner*, *Sanitation Men* and *Turley* were cut from the same pattern as New York Election Law § 22.

No good purpose would be served by restating, in this brief, the Court's holdings in that line of cases. However, in order to underscore that Mr. Lefkowitz misconceives the issue here, it is vital to note the doctrinal development which they represent: the principle of law formulated in *Garrity* in an opinion for five Justices was refined in *Gardner* and *Sanitation Men* so as to command the concurrence of the entire Court. Justice Harlan, for himself and Justice Stewart, concurred specially in *Sanitation Men* and *Gardner*, noting that he found in the opinions of the Court "a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices." 392 U.S. at 285. The "formula" set out by the Court in *Gardner*, 392 U.S. at 278, and in more detail in *Sanitation Men*, 392 U.S. at 284, consisted of a suggestion that a public employee might be discharged if he or she refused to answer questions specifically and narrowly addressed to matters relevant to

the performance of official duties without requiring a forfeiture of the important rights which the fifth amendment self-incrimination provision protects.

In subsequent proceedings in *Sanitation Men*, the petitioners there were given a form of use immunity, 426 F.2d at 621, and persisted in a refusal to answer proper questions. Judge Friendly, writing without the aid of this Court's later opinion in *Kastigar* v. *United States*, 406 U.S. 441 (1972) (upholding use immunity as opposed to transactional immunity); *cf.* *Piccirillo* v. *New York*, 400 U.S. 548 (1971), found the procedure adopted consistent with this Court's teaching and upheld dismissals of the recalcitrant employees from public employment. This Court denied certiorari. 406 U.S. 961 (1972).

By the time *Lefkowitz* v. *Turley*, *supra*, was decided, just three Terms ago, the entire Court was in agreement that the compulsion of a statute like New York Election Law § 22 violates the fifth amendment self-incrimination clause and that the State is not thereby left powerless to enforce its legitimate interests. 414 U.S. at 84-85. Six members of the Court held that the State could confer use immunity and exact relevant testimony, and three members hewed to the view that transactional immunity was necessary.

Mr. Nadjari declined to follow the path this Court and the Second Circuit had so clearly charted, but insisted instead upon attempting to compel appellee either to testify before the grand jury or forfeit the political positions to which he had been elected. The three-judge court responded—and quite properly—by invalidating N.Y. Election Law § 22.

Appellant seeks to answer the three-judge court by pretending that the questions settled in the *Garrity-Turley* line of cases were never decided, and by pretending to be in a dilemma which does not exist.

A. Garrity, Gardner, Sanitation Men *and* Turley *Control this Case.*

The rule of these cases was reaffirmed as recently as last Term in *Baxter* v. *Palmigiano,* 425 U.S. 308 (1976), the very case from which appellant purports to derive so much comfort.[2] The doctrine so recently reaffirmed has commanded the continued respect of this Court because it lies at the heart of the important interests which the privilege against self-incrimination has protected since the tumultuous events of the seventeenth century, marked by the forthright declarations of the Long Parliament. L. Levy, *Origins of the Fifth Amendment* (1968). Mr. Justice Stewart has summarized this history:

> "We must determine whether the petitioner has been 'compelled . . . to be a witness against himself.' Compulsion is the focus of the inquiry. . . . When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced."

[2] *Baxter* reaffirms that use immunity must be offered if the State insists upon a person's testimony:

> "Had the State desired Palmigiano's testimony over his Fifth Amendment objection, we can but assume that it would have extended whatever use immunity is required by the Federal Constitution." 425 U.S. at 318.

Griffin v. *California,* 380 U.S. 609, 620 (1965) (dissenting opinion).

The compulsion inherent in tendering the oath *ex officio* finds modern echo in N.Y. Election Law § 22. And the *automatic* assumption of guilt, or at least the *automatic* liability to serious sanctions, also present in § 22,[3] is the impermissible result of this unlawful coercion. *Baxter* v. *Palmigiano, supra.* Appellant's contrary contention can only spring from a studied indifference to constitutional history. See generally L. Levy, *supra,* and sources cited therein.

Appellant even seems to suggest that public officials do not possess fifth amendment rights. *E.g.*, Brief for Appellant, p. 12 n. ***, p. 19. This Court early settled that question. In *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 144 (1803). Attorney General Levi Lincoln was summoned to this Court's hearing on a rule to show cause and handed questions in writing concerning his conduct while Secretary of State. Lincoln objected that "he ought not to be compelled to answer any thing which might tend to criminate himself." The Court said that he was not "obliged to state any thing" incriminatory. Attempts during the colonial period to impose the oath *ex officio* procedure—or any similar

[3] Appellant concedes that the consequences—loss of party office and disqualification from public office—follow automatically, without reference to any other evidence of fitness or any consideration of why a party officer might decline to waive immunity in a secret inquisitorial proceeding run by a prosecutor with a political and personal motive to discredit him. Brief for Appellant, p. 25 n. *.

device for compelling testimony—against a public official met consistent and hostile criticism. L. Levy, *supra,* at 359-60 (case of Growdon) and 373 (case of Beekman).

Appellant argues, however, that the State's interest in the integrity of the political process and the unsalaried character of Mr. Cunningham's offices provide some basis for departing from principles of law so recently reaffirmed. This argument proves too much.

The State's interest may be great, but it may not be served by means which fall afoul of constitutional guaranties.[4] The integrity of the police, honesty in the civil service, and the scrupulous use of public works funds—all important interests—must be served, under this Court's command, only in ways which do not unconstitutionally compel testimony. The State's power to regulate the civil service and the police is, indeed, greater than its power to intrude upon the processes of campaigning for public office, running a political party, and selecting public officials. Compare *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), *Civil Service Comm'n* v. *Letter Carriers,* 413 U.S. 548 (1973), and *Kelley* v. *Johnson,* 425 U.S. 238 (1976), with *Cousins* v. *Wigoda,* 419 U.S. 477 (1975), *Buckley* v. *Valeo,* 424 U.S. 1 (1976), *Powell* v. *McCormack,* 395 U.S. 486 (1969), and *Bond* v. *Floyd,* 385 U.S. 116 (1966).

No, there are some alleged impurities which the Constitution requires be left to the alembic of public criti-

[4] The argument from interest is, moreover, absurd and ahistorical on its face. Compulsion to testify does not become more tolerable because the State's more vital concerns are at stake. Were it otherwise, the Court of High Commission and the Star Chamber would not have been abolished, but would simply have been confined to serious cases such as treason and sorcery.

cism and debate. Particularly is this so when the remedy the State proposes consists of depriving the electors, members of a voluntary political association, of the leadership and representation they have chosen, without any showing other than a refusal to waive immunity. See Point II, *infra.*

Nor can the State's characterization of Mr. Cunningham's interest as derisory withstand a moment's scrutiny. He has been and will be stigmatized by the conclusion that he is unfit for his present position and for all public offices. This principle was reaffirmed in *Board of Regents* v. *Roth,* 408 U.S. 564, 573-74 (1972). He is deprived of a first amendment right possessed by all citizens, the right of political association and to run for and hold party and political office. *Bond* v. *Floyd, supra; Powell* v. *McCormack, supra; Williams* v. *Rhodes,* 393 U.S. 23 (1968). These cases have not made a distinction between salaried and nonsalaried political positions. The fact that Mr. Cunningham may be free to pursue his law practice is irrelevant; the stigma which attaches to him from forced removal cannot but have a deleterious effect there, too.[5] See *Board of Regents* v. *Roth, supra,* 408 U.S. at 576-78.

Moreover, as we note in Point II, *infra,* the State—in stripping Mr. Cunningham of his posts and forbid-

[5] Such reasoning underlies the Court's holdings in the *Garrity-Turley* line of cases. Garrity could have become a police chief elsewhere, Gardner could have found work as a policeman in another place or as a private security guard, the sanitation men could work for a trash removal firm, and the contractors in *Turley* were free to take on as much private business as they liked. The Court found harm from the *nature* of the sanction imposed for resisting compulsion.

ding him to venture into political or party office for five years—effectively deprives the electorate of free choice.

B. The State's Purported Dilemma Does Not Exist.

The State purports, Brief for Appellant, pp. 12-13, to be forced to choose between prosecuting Mr. Cunningham and obtaining his testimony before a grand jury. No such choice is imposed upon the State. True, N.Y. Criminal Procedure Law §§ 190.40-190.45 mandate transactional immunity for grand jury witnesses who do not sign a waiver of immunity, but this is a fact which arises from New York's legislature having enacted such a provision.

More tellingly, the State has never sought to do here what it did on remand in *Sanitation Men*[6]—that is, to offer Mr. Cunningham a form of use immunity by means of a *limited* waiver, which the Court in *Lefkowitz* held would be adequate to protect against unlawful compulsion. 414 U.S. at 84-85.

II. Substantial First and Fourteenth Amendment Interests Forbid the Direct Intrusion Into the Political Process Represented by N.Y. Election Law § 22.

New York's Democratic Party and the Bronx County Committee are voluntary political associations. They have procedures for electing and for removing officers. See, *e.g.*, Rules of the Democratic Party of New York, Art. II, § 12, Appendix, p. 41; N.Y. Election Law §§ 12, 13, 15. New York Election Law § 22 states that, upon the happening of a designated event, a party officer elected according to the provisions of law by the suffrage of enrolled voters shall be stripped of his or

[6] 426 F.2d at 621.

her office and thereafter barred from party and public office. This triggering event, as dramatically illustrated by this case, may be the issuance of a grand jury subpoena at the behest of a prosecutor who is himself a political officer.

Such an interference into party and electoral affairs comes to this Court bearing a burden of justification. This Court has repeatedly struck down provisions of law and other manifestations of governmental action which restricted voter choice,[7] imposed a burden upon access to and participation in the process of running for and holding office, or otherwise infringed upon the principle that the electorate, not the State, controls the political process. *Bond* v. *Floyd, supra; Powell* v. *McCormack, supra; Williams* v. *Rhodes, supra; Buckley* v. *Valeo, supra.*

This Court has warned that these freedoms are not absolute, *Civil Service Comm'n* v. *Letter Carriers,* 413 U.S. 548, 567 (1973), but it has always stressed that when regulating concerning them the State must use the least possible power:

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose."

Shelton v. *Tucker,* 364 U.S. 479, 488 (1960), quoted in *Buckley* v. *Valeo,* 424 U.S. at 238-39 (opinion of Bur-

[7] Appellee has standing to raise the restriction of voter choice. This is a case in which the persons who voted for Mr. Cunningham, though not parties here, stand to lose. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 611 (1973).

ger, C.J.). See also *Cantwell* v. *Connecticut,* 310 U.S. 296, 304 (1940); *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (1965) (Brennan, J., concurring).[8] See also *Ripon Society* v. *Nat'l Republican Party,* 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), *cert. denied,* 424 U.S. 933 (1976).

III. New York Election Law § 22 Creates an Invalid Conclusive Presumption of Unfitness for Party and Political Office.

Appellant interprets Mr. Cunningham's refusal to execute a waiver of immunity as a "conclusive and self-evident . . . admission" of unwillingness to account for his conduct in office and argues that this asserted unwillingness is enough to require a conclusion that he is unfit to hold the particular offices which the appellant seeks to have him forfeit. Brief for Appellant, p. 25 n.*. These assertions defy logic and law.

Mr. Cunningham's unwillingness to sign a waiver of immunity in a secret grand jury session where he had no right to counsel, which was run by a politically motivated appointee of the opposite party—whose conduct in office has caused judicial warnings and alarms,[9] is not susceptible of any particular interpretation, let

[8] First amendment freedoms need "breathing space". The atmosphere in Mr. Nadjari's grand juries was positively choking. See *People* v. *Brust*, — Misc.2d —, — N.Y.S. 2d — (1976), New York Law Journal, Dec. 2, 1976, p. 12; *People* v. *Di Sapio*, — Misc. 2d —, — N.Y.S.2d — (1976), New York Law Journal, Dec. 20, 1976, p. 1.

[9] See, *e.g.*, *People* v. *Brust*, *supra*; *People* v. *Di Sapio*, *supra*; *People* v. *Cunningham*, *supra*. In his December 22, 1976 opinion in *Cunningham*, Judge Sandler found that the grand jury tactics of Mr. Nadjari and his associates in the *Cunningham* case would have required dismissal even if there had been evidence of wrongdoing. Slip Opinion, p. 22, N.Y. Law Journal, Dec. 23, 1976 at p. 13.

alone the conclusive one proposed by the appellant. At the very least one ought to view this matter differently from a refusal to account to some party body, or even to a public legislative inquiry. Compare *Wieman* v. *Updegraff,* 344 U.S. 183 (1952). Mr. Cunningham, it bears noting, was not asked a single question before the grand jury other than whether he would sign the waiver of immunity.

Slochower v. *Bd. of Higher Education,* 350 U.S. 551 (1956), establishes that the appellant's position is meritless.[10] Conclusive presumptions have, moreover, been generally disfavored in this Court's decisions, *e.g.*, *Heiner* v. *Donnan,* 285 U.S. 312 (1932); *Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973), and all presumptions which give more weight to facts than they can properly bear have been seriously questioned. *E.g., Leary* v. *United States,* 395 U.S. 6 (1969); *United States* v. *Romano,* 382 U.S. 136 (1965).

The inference—not even a presumption—permitted in *Baxter* v. *Palmigiano,* 425 U.S. 308 (1976), was expressly limited to permitting the trier of fact in a routine prison discipline case to give silence such limited weight as it deserved in light of an entire record developed in accordance with due process standards.

IV. If the Decision Below Is Reversed, It Must Be With Directions To Enjoin the State from Exacting the Consequences of New York Election Law § 22 in Any Case.

Appellee, relying on prior decisions of this Court, declined to execute a waiver of immunity. A reversal, rather than ordering the complaint dismissed, would properly direct that appellee be given another oppor-

[10] See also *Sheiner* v. *State,* 82 So.2d 657, 662 (1955).

tunity to appear before the grand jury (which is now directed by a different Special Prosecutor), or that a hearing be held concerning appellee's reasons for refusing to sign the waiver of immunity. See generally *Maness* v. *Myers*, 419 U.S. 449 (1975).[11]

CONCLUSION

In light of the foregoing the judgment below should be affirmed.

Respectfully submitted,

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[11] A similar approach was taken in *Gelbard* v. *United States*, 408 U.S. 41 (1972), in which respondent Egan had, before the grand jury, invoked an objection based on alleged wiretapping. The wiretapping was later denied by the Solicitor General, which rendered Egan's claim invalid. The Court's judgment had the effect of giving her another opportunity to appear before the grand jury, and all members of the Court agreed this was a proper procedure. See 408 U.S. at 72 n. 1 (Rehnquist, J., dissenting). See also 408 U.S. at 61-62 n. 23.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-260

LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

Appellant,

—against—

PATRICK J. CUNNINGHAM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-260

LOUIS J. LEFKOWITZ,
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Appellant,

against

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Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE

INTEREST OF AMICI

The American Civil Liberties Union is a nationwide, nonpartisan organization engaged in the defense of those principles embodied in the Bill of Rights. The New York Civil Liberties Union is the New York State affiliate of the ACLU.

Prominent within the pantheon of constitutional principles are the associational freedoms implicit within the First Amendment and the freedom from self-incrimination as protected by the Fifth Amendment. The instant case presents an interplay between those two fundamental freedoms. Accordingly, the ACLU and NYCLU request the opportunity to discuss that interplay by submitting a brief amici curiae. At the invitation of the Court below, the NYCLU appeared in an amicus capacity. Counsel for both parties have consented to the filing of the instant brief by amici.

SUMMARY OF ARGUMENT

Section 22 of the New York Election Law, by disqualifying appellee from holding all party office, unconstitutionally intrudes into the internal affairs of a private political association. The provision thus violates the First Amendment's freedom of association in derogation of the rights of appellee as well as the rights of the members of the New York State Democratic Party.

Section 22 of the New York Election Law also unconstitutionally compels testimony that has not been immunized from subsequent criminal prosecution in a manner that offends the privilege against self-incrimination. An unconstitutional coercion of the freedom from self-incrimination exists not only because Section 22 imposes substantial economic penalties upon appellee but perhaps more profoundly because

it conditions the exercise of the privilege against self-incrimination upon the waiver of appellees associational freedoms. Moreover, the circumstances surrounding appellee's refusal to waive his privilege against self-incrimination can invite no adverse inference of wrongdoing whatever. Thus, the coercive scheme imposed by Section 22 of New York's Election Law must, therefore, be invalidated.

ARGUMENT

I. SECTION 22 OF NEW YORK'S ELECTION LAW IMPERMISSIBLY REQUIRES APPELLEE TO WAIVE ONE CONSTITUTIONALLY PROTECTED RIGHT IN ORDER TO INVOKE A SECOND, EQUALLY SIGNIFICANT, RIGHT.

This Court has systematically ruled that the imposition of a serious collateral sanction may not be utilized as a penalty for the failure to waive a constitutional right. Eg. Sherbert v. Verner, 374 U.S. 398 (1963); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Harman v. Forssenius, 380 U.S. 528 (1965); Doyle v. Ohio, ___ U.S. ___, 44 U.S.L.W. 4902 (1976). See generally, Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L.Rev. 1439 (1968). As the Court below noted, the collateral sanction of loss of position imposed upon appellee as the penalty for refusing to execute a blanket waiver, in advance, of his Fifth Amendment rights was violative of an unbroken line of cases applying the general rule aginst such collateral sanctions in the specific context of attempts to coerce the waiver of Fifth Amendment rights. Eg. Lefkowitz v. Turley, 414 U.S. 70 (1973). However, in view of the unique political sanction imposed by Section 22 of New York's Election Law 1/ appellee was not merely threatened with a collateral penalty of substantial (albeit non-constitutional) dimension because he refused to waive his Fifth Amendment rights, he was placed in the untenable position of being forced to endure

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1/ Section 22 applies solely to officials of political parties and, in effect, bars them from party office unless they waive their rights under the Fifth Amendment.

the loss of one constitutional right as the inevitable consequence of exercising a second, equally significant, constitutional right.

Since this Court's decision in Williams v. Rhodes, 393 U.S. 23 (1968), it has been clear that the right to join a political party and to participate in its internal affairs is protected against state encroachment by the First Amendment's guarantee of freedom of association. Accordingly, in participating vigorously in the internal affairs of the New York State Democratic Party and serving as its Chairman, appellee was engaged in classic First Amendment activity. Eg. Kusper v. Pontikes, 414 U.S. 51 (1973). Moreover, given his avowed status as a target of the grand jury before which he appeared, appellee was clearly within his Fifth Amendment rights in insisting upon remaining silent unless and until the measure of "use" immunity described in Gardner v. Broderick, 392 U.S. 273 (1968) and Lefkowitz v. Turley, 414 U.S. 70 (1973) was granted to him. 2/ Given the automatic effect of Section 22, therefore, the price of appellee's exercise of his First Amendment right to continued activity within the New York State Democratic Party was the surrender of his Fifth Amendment rights. Conversely, the price of appellee's exercise of his Fifth Amendment rights was the coerced surrender of his First Amendment activities. Whatever the law may be concerning the application of collateral penalties of a non-constitutional nature as the price of exercising a constitutional right, surely the price of one constitutional right cannot be the destruction or waiver of a second, equally significant, constitutional right. cf. Dunn v.

2/ This case, and the several which have preceded it from New York, raising similar issues, are the consequence of stubborn refusal of New York authorities to utilize the use immunity device described by Mr. Justice White in Lefkowitz v. Turley, supra.

Blumstein, 405 U.S. 330, 342 (1972) (state may not force a choice between the right to travel and the right to vote).

Accordingly, given this Court's consistent refusal to tolerate sub-constitutional collateral sanctions as a penalty for the failure to waive Fifth Amendment rights, this case, involving as it does a collateral sanction which impinges on First Amendment values, would appear to present the clearest example of unconstitutional behavior.

II. SECTION 22 OF NEW YORK'S ELECTION LAW UNCONSTITUTIONALLY ABRIDGES THE RIGHT OF MEMBERS OF POLITICAL PARTIES TO SELECT THEIR LEADERS FREE FROM STATE COMPULSION. 3/

Political parties stand in an anomalous position within our legal system. On the one hand, it is now clear that when political parties are engaged in the selection of nominees for public office, they perform a integral parts of a state's electoral process and are, thus, subject to wideranging constitutional scrutiny as well as regulation when necessary to advance a compelling state interest. Eg. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953); Rosario v. Rockefeller, 410 U.S. 752 (1973); Storer v. Brown, 415 U.S. 724 (1974); American Party of Texas v. White, 415 U.S. 767 (1974). On the other hand, it is equally clear that political parties, as private associations of individuals seeking common political objectives, are substantially insulated by the First Amendment from undue state intrusion into internal party affairs. Eg. Williams v. Rhodes, 393 U.S. 23 (1968); Kusper v. Pontikes, 414 U.S. 51 (1973); O'Brien v. Brown, 409 U.S. 1 (1972); Cousins

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3/ Appellee possesses standing to assert the associational rights of the Democratic Party itself as well as the rights of its members. Eg. Singleton v. Wulff ___ U.S. ___, 44 U.S.L.W. 5213 (1976); Eisenstadt v. Baird 405 U.S. 438 (1972); Procunier v. Martinez, 416 U.S. 396 (1974); See generally NAACP v. Alabama 357 U.S. 449 (1958).

v. Wigoda, 419 U.S. 477 (1975). Thus, when a state seeking to impose regulations upon a political party goes beyond regulation of the nominating process and attempts to interfere with internal party affairs, the associational rights of the party and its members are endangered. Cousins v. Wigoda, supra, at 487-788. In purporting to remove appellee from the elected Chairmanship of the New York State Democratic Party and in seeking to bar him from internal party office for five years, New York has strayed far beyond the permissible limits of regulation of the nominating process and has unduly intruded itself into the internal affairs of a private political association. 4/

4/ Appellants seek to justify New York's attempt to dictate the leadership of the Democratic Party by arguing that the Party Chairman engages in the selection of successor nominees o replace those initial nominees who resign or die prior to election. Moreover, argues appellant, a Party Chairman plays a significant role in determining whether non-members of the Party are to be permitted to seek the Party's nomination. However, despite appellee's sporadic and insignificant participation in the nomination process, the vast bulk of a Party Chairman's duties involve exlcusively internal concerns of the Party, such as the articulation of the Party's platform and the internal organization of its structure. At most, New York may seek to regulate appellee's role in the nominating process. Instead, Section 22 seeks to prevent appellee from carrying out his purely private functions as Party Chairman as well, thus rendering the statute unconstitutionally overbroad. Eg. Lewis v. City of New Orleans, 415 U.S. 130 (1974); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

In Cousins v. Wigoda, 419 U.S. 477 (1975), this Court confronted a similar clash between a state regulatory scheme and internal decisions of a political party. In Cousins, "regular" delegates to the 1972 Democratic National Convention, elected in accordance with valid Illinois law, sought to prevent an insurgent slate of delegates which had been recognized by the convention's Credentials Committee, from replacing them as the Illinois' delegation. The "regulars" argued that valid Illinois law governed the Illinois delegate selection process and that if Illinois law conflicted with the internal rules of the Democratic Party, Illinois law must prevail. The regulars obtained a state injunction against the insurgents, which was arguably violated by the insurgents when they were seated as the accredited Illinois delegation. In refusing to hold the insurgents in contempt, this Court ruled that the internal decisions of the Democratic Party were not subject to frustation by the Illinois election law. Similarly the internal decision of the membership of the New York State Democratic Party to elect appellee as Party Chairman is not subject to veto at the hands of a benevolent state. The decision as to who is best suited to lead the New York State Democratic Party is a private associational one which may not be pre-empted by Section 22 of New York's Election Law.

III. THE OPERATION OF SECTION 22 OF THE NEW YORK ELECTION LAW UNCONSTITUTIONALLY COERCES APPELLEE INTO WAIVING HIS PRIVILEGE AGAINST SELF-INCRIMINATION

The lesson of the Supreme Court decisions from Garrity v. New Jersey 385 U.S. 493 (1967) through Lefkowitz v. Turley, 414 U.S. 70 (1973) is clear. The state may not condition employment, 5/ licensure, 6/ government contracts 7/ or public office 8/ upon the waiver of the constitutional privilege against self-incrimination. This doctrinal line of authority rests upon two propostions. First, that there is a significantly coercive quality to the imposition of such conditions. Second, that persons acting in a public or even quasi-public capacity may be compelled to respond to questions about their performance of public duties but only if their answeres cannot be used against them in subsequent criminal prosecutions. Measured against these two propositions appellants' attempted enforcement of Section 22 of the New York Election Law violates the privilege against self-incrimination in precisely the same manner as the provisions that were at issue in Garrity v. New Jersey, supra, Spevak v. Klein, 385 U.S. 511 (1967), Gardner v. Broderick 392 U.S. 273 (1968), and Lefkowitz v. Turley, supra.

5/ Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Sanitation Men v. Commissioner, 392 U.S. 280 (1968).

6/ Spevack v. Klein, 385 U.S. 511 (1967).

7/ Lefkowitz v. Turley, 414 U.S. 70 (1973).

8/ Garrity v. New Jersey, supra.

Following is a discussion of these two propositions within the context of the case at bar.

A. The Coercive Impact of Section 22 of the New York Election Law

Under the terms of Section 22 of the New York Election Law, a party officer who is compelled to appear before a Grand Jury and testify regarding the performance of official duties must answer all relevant questions and waive immunity from subsequent prosecution. A party officer who refuses to sign a waiver of immunity is, pursuant to Section 22, to be removed from party office and disqualified from holding any party or public office for a period of five years. Thus, in the case at bar, appellee was called before a Grand Jury and asked questions regarding the performance of his responsibilities as chairman of both the Bronx County Democratic Executive Committee and the New York State Democratic Committee. In this regard, he was asked to execute a waiver of immunity and warned that a refusal to execute such a waiver would result in the imposition of the sanctions mandated by Section 22 of the New York Election Law.

It is probably the case that in light of this Court's decision in Garrity v. New Jersey, supra, any waiver so executed would be invalid and any answers that were extracted under these circumstances would be inadmissible in a subsequent criminal prosecution. Nevertheless, there is no evidence in the record below that the New York State prosecutor was prepared to accept the efficacy and applicability of this Court's decision in Garrity. As Mr. Justice White pointed out in describing the Gardner case

"Although under Garrity any

> waiver executed may have been invalid and any answers elicited inadmissible in evidence, the State [of New York] did not purport to recognize as much and instead attempted to coerce a waiver on the penalty of loss of employment."
> Lefkowitz v. Turley, supra at 80-81.

Thus, in the case at bar, New York is apparantly behaving in precisely the same way that it behaved in Gardner v. Broderick, supra, and in Lefkowitz v. Turley, supra. New York continues to demand that certain persons called before the Grand Jury must execute a waiver of immunity. New York continues to deny the efficacy of Garrity's exclusionary rule. And in this case New York continues to coerce a waiver by threatening appellee with the loss of party office and future public employment.

In Malloy v. Hogan 378 U.S. 1, 8 (1964) this Court had defined the privilege against self-incrimination as

> "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty...for such silence."

And "penalty", Mr. Justice Douglas said subsequently in Spevak , supra at 515, "is not restricted to fine or imprisonment. It means... the imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly'." Thus, in Garrity, supra at 497, this Court found that

> "[t]he option to lose their means of livelihood or pay the

> penalty of self-incrimination is the anti-thesis of free choice. That practice, like the interrogation practices we reviewed in Miranda v. Arizona [citations omitted] is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'"

Garrity involved the threatened removal of certain public employees from positions as police officer and chief of police. This Court found the sanctions of employment disqualification to be impermissibly coercive. In Spevak v. Klein, supra, this Court found that the sanction of disbarment was similarly coercive not merely because it involved the loss of one's livelihood but because it involved as well the loss of one's good name and reputation within the community. Writing for the Court in Spevak, Mr. Justice Douglas asserted supra at 517,

> "that the Self-Incrimination Clause...should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."

In Gardner v. Broderick, supra, and in Sanitation Men v. Commissioner, supra, this Court again found the threatened discharge from public employment to be unconstitutionally coercive. And in Lefkowitz v. Turley this Court concluded that the loss of potential government contracts could not be imposed as sanctions to exact the waiver of one's privilege against self-incrimination.

The case at bar falls squarely within the precedential parameters of the Garrity-Turley line of authority. The disqualification that is imposed by Section 22 of the New York Election Law does not only involve a forfeiture of party office. In addition, Section 22 quite explicitly would disqualify appellee from holding any public office for the next five years. It thus poses a potential economic sanction which is clearly as severe as that in issue in Lefkowitz v. Turley, supra.

Appellant attempts to minimize this potential economic loss by advancing two arguments. First, appellant contends that since Mr. Cunningham "enjoys no property right to [future] office which is cognizable under the Constitution" the economic penalty is insubstantial. (Appellant's Brief p. 13). In response to this argument it must be noted that the architects that were before this Court in the Turley case enjoyed no property right to future government contracts. Nevertheless, this Court found that their disqualification from future government contracts imposed an economic sanction that was unconstitutionally coercive. Moreover, it is not clear whether the public employees who were threatened with job forfeiture in Garrity, Sanitation Men and Gardner were tenured employees with constitutionally cognizable property interests in their employment or whether they were probationary employees with no such property interest. That factual question is unclear simply because those cases did not turn upon whether the employees did or did not have property interests in their jobs. Rather those cases focused upon the coercive impact of compelling the waiver of the right to remain silent with the threat of disqualification from present and future employment. That same analytical focus should obtain here.

Appellant also attempts to minimize the instant economic penalty by contending that

Mr. Cunningham could "obtain equivalent remuneration elsewhere if he were in fact deprived of a salaried position." (Appellant's Brief p. 14). This contention is again quite similar to the argument advanced by appellant in the Turley case and rejected by this Court. In Turley, supra at 84, Mr. Justice White observed that "[a] significant infringement of constitutional rights cannot be justified by the speculative ability of those affected tocover the damages."

It is thus plain that Section 22, to the extent that it forecloses present and future public employment imposes an unconstitutional economic sanction for the exercise of one's Fifth Amendment privilege. But as this Court also suggested in Spevak, supra at , economic sanctions are not the only sort of penalty which will be found to coercively disable an individual from making a free and rational choice regarding the right to remain silent. As noted above, and as the district court below observed, "the threat of loss of professional standing and of reputation are powerful forms of compulsion" 9/ -- even though such sanctions are non-pecuniary in nature. In the context of the present case appellee is threatened with removal from his position as "the top leader of the Democratic Party in New York State." (New York Democratic Party Rules, Art IV, Sec. 1(b)(ii)). The loss of that position necessarily involves the loss of stature and public reputation. It is a loss that must impact coercively upon the free and unfettered decision as to whether to forego the privilege against self-incrimination.

9/Jurisdictional Statement p.14a.

Finally, but perhaps most significantly, Section 22 exacts the loss of party office as the price for the exercise of one's privilege against self-incrimination. As noted supra, Points I and II, participation in the affairs of a political party and holding party office are activities that are protected by the associational freedoms implicit in the the First Amendment. Thus New York is conditioning the exercise of one constitutional right upon the waiver of another. Accordingly, there is a coercive quality to New York's conduct in the present case that did not exist in any of the previously discussed cases. New York is not merely giving Mr. Cunningham the option between employment and the exercise of his Fifth Amendment rights. New York is giving him the option between exercising his Fifth and his First Amendment rights. Conditioning the exercise of Fifth Amendment rights upon the waiver of freedoms secured by the First Amendment must necessarily be found to be impermissibly coercive.

B. The State Cannot Compel Testimony That Has Not Been Immunized From Use In a Subsequent Criminal Prosecution

Amici do not contend that persons acting in a public or even quasi-public capacity may not be compelled to respond to questions about their performance of public duties. Indeed such persons can be questioned and removed from office for failing to properly account for their performance. But such persons cannot be questioned about matters that will expose them to criminal sanctions unless such individuals are afforded formal assurance that their answers will not be used in subsequent criminal prosecutions. See Lefkowitz v. Turley, supra at 283. See also Mr. Justice White's

concurrence in Maness v. Meyers, 419 U.S. 449, 475-476 (1975). 10/ And such persons cannot be removed from office for refusal to relinquish constitutional rights. Gardner v. Broderick, supra; Sanitationmen v. Commissioner, supra; See also Keyishian v. Board of Regents, 385 U.S. 589 (1967). 11/

10/ Mr. Justice White's concurring opinion in Maness v. Meyers, 419 U.S. 449, 475-476 (1975) emphasizes the importance of formal immunity protections. The opinion points out that, "If the state makes sufficiently clear that it recognizes this established rule [of 'testimonial' immunity] the attorney would have no business advising his client to disobey the court's order to answer. But the possiblity, much less the reality, of a compelled answer, along with its fruits, being immunized from later use was hardly brought home to this petitioner or his client...." In this case, as well, the possibility of testimonial immunity was not brought home to appellee.

11/ In the case at bar, the interest of the state in "safeguarding against corruption and the appearance of corruption in the political system" (Brief for Appellant at p.6) is no different from the interests asserted in Garrity and Gardner, to wit, safeguarding against corruption and the appearance of corruption among law enforcement officials. Moreover, the high political office that appellee Cunningham holds is not much different from the high governmental office that Mr. Garrity maintained as the police chief of a New Jersey borough. Accordingly, the State of New York is no more

In the instant case, the state prosecutor provided no formal assurance to appellee that his testimony would not be used in a subsequent criminal prosecution. On the contrary, the prosecutor demanded a complete waiver of immunity. The New York prosecutor again sought to do what the Garrity-Turley line of authority forbids. New York sought to compel testimony that has not been immunized. See particularly, Lefkowitz v. Turley, supra at 82. And then New York compounded its error by seeking to automatically disqualify appellee from public office, not for failure to answer questions about his official duties, but for refusal to waive a constitutional right. This New York cannot do. In Gardner v. Broderick, supra at 278, Mr. Justice Fortas specifically addressed this issue. He pointed out that Gardner

> "was discharged from office, not for failure to answer relevant questions about his official duties but for refusal to waive a constitutional right. He was dismissed for failure to relinguish the protection of the privilege against self-incrimination.... New York City discharged him for refusal to execute a document purporting to waive his constitutional rights and to permit prosecution of himself on the basis of his compelled testimony. [Gardner] could not have assumed - and certainly he was not required to assume - that he was being asked to do an idle act of no legal effect....It is clear that [Gardner's] testimony was demanded before the Grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to compel [Gardner] to waive his immunity."

New York continues to repeat its unconstitutional conduct.

If New York had formally assured Mr. Cunningham that he would have testimonial immunity in subsequent criminal prosecutions, it could have, consistent with the constitution, questioned appellee regarding his public functions. And if, upon questioning appellee about his public functions, New York concluded that appellee was not properly executing those functions New York was then at liberty to take appropriate remedial steps. 12/

(footnote 11 cont'd.) justified in removing appellee from office for invoking his privilege against self-incrimination than the State of New Jersey would have been in removing Police Chief Garrity.

12/ As Amici suggest in Point II of this brief, the vast bulk of appellees responsibilities with the New York State Democratic Party extend to exclusively internal concerns of the party. In this regard appellee is engaged in private associational activity

But New York never formally granted appellee testimonial immunity and, instead, continued to utilize procedures that have been consistently invalidated by this Court. New York's conduct must again be condemned and invalidated.

(footnote 12 cont'd.) and is responsible to the members of the Democratic Party for the proper execution of that activity. The State of New York is barred by the First Amendment from intruding into the internal management of the Democrat's political association. New York can, however, appropriately regulate those aspects of appellees responsibilities that inextricably involve him in the nominating process, only so long as the regulating statute is not overly broad. See footnote 4, supra.

IV. APPELLEE'S REFUSAL TO WAIVE HIS FIFTH AMENDMENT RIGHTS CANNOT JUSTIFY EVEN AN INFERENCE OF WRONGDOING

Twenty years ago, both Justice Frankfurter 13/ and Dean Griswold 14/ reminded us that the Fifth Amendment is more than a loophole for the guilty. Rather, it stands as a bulwark for the innocent, protecting individuals against the potentially overwhelming power of an overzealous or irresponsible prosecutor. Accordingly, this Court has repeatedly recognized that a refusal to waive the Fifth Amendment's protection may be fully consistent with innocence. Grunewald v. United States, 353 U.S. 391 (1957). See also, Griffin v. California, 380 U.S. 609 (1965); Doyle v. Ohio, ___ U.S. ___ (1976).

Unfortunately, despite the efforts of Mr. Justice Frankfurter and Dean Griswold and despite a virtually unbroken line of decisions of this Court, the fallacy persists that a refusal to waive Fifth Amendment rights justifies an inference of quilt. In this case, New York has compounded that unfortunate

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13/ "This command of the Fifth Amendment... registers an important advance in the development of our liberty - 'one of the great landmarks in man's struggle to make himself civilized.'...Too many, even those who should be better advised, view the privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either quilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the partriots who sponsored the Bill of Rights...." Ullman v. United States , 350 U.S. 422, 426-427 (1956).

14/ See Also Griswold, The Fifth Amendment Today, pp. 9-22.

fallacy by treating appellee's refusal to waive his Fifth Amendment rights, not merely as a permissible inference of wrongdoing, but as a final admission of guilt justifying his peremptory removal from office. Even if some inference of wrongdoing might properly be drawn. under certain circumstances, from a claim of Fifth Amendment privilege, surely such a weak and ambiguous inference cannot justify, without more, the imposition of sanctions predicated on guilt. Baxter v. Palmigiano, ___ U.S. ___, 47 L.Ed 2d 810, 821 (1976). Moreover, under the circumstances of this case, no inference whatever may be drawn from appellee's refusal to waive his Fifth Amendment rights. As we have seen, one of the prime functions of the Fifth Amendment is to provide an innocent individual with some protection against an overbearing prosecutor. The plight of the Special Prosecutor in this case, whose reputation, and, indeed, survival in office, depended upon implicating appellee in criminal action would have rendered it pure folly for appellee to have abandoned his Fifth Amendment rights. 15/ Indeed, it is doubtful whether St. Francis of Assisi would have waived his rights under similar circumstances. Thus, under the facts of this case, no inference of wrongdoing, (no matter how slight) may rationally be drawn from appellee's simple act of self-

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15/ The Special Prosecutor, against whom appellee invoked his Fifth Amendment rights, had been continued in office for six additional months for the avowed purpose of completing his investigation of appellee.

preservation. Accordingly, even under the arguably relaxed standards of Baxter v. Palmigiano, supra, 16/ appellee's refusal to waive his Fifth Amendment rights cannot trigger the collateral disability imposed by Section 22 of New York's Election Law.

16/ Amici regret this Court's decision in Baxter v. Palmigiano, supra, which appears to permit a claim of Fifth Amendment privilege to give rise, under appropriate circumstances, to a weak permissive inference of wrongdoing. Baxter, limited as it is, constitutes an unfortunate regression to a 'hostile' and 'niggardly' view of the Fifth Amendment. However, since New York has attempted to draw, not a weak permissible inference, but a virtual irrebutable presumption of guilt, and since the factual circumstances surrounding the claim of privilege by appellee do not justify any inference of wrongdoing whatever, Section 22 cannot be sustained, even under Baxter v. Palmigiano.

CONCLUSION

For the foregoing reasons, the decision of the Court below should be affirmed.

Respectfully submitted,

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